88-863

No.

Supreme Court, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

ESTHER FRIEDGOOD,
*Petitioner,*

vs.

PETERS PUBLISHING CO., etc.,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

HORTON, PERSE & GINSBERG
ARNOLD R. GINSBERG
*(Counsel of Record)*
and
HOPPE, BACKMEYER & NELSON
Suite 410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427
*Attorneys for Petitioner*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

I.

## QUESTIONS PRESENTED FOR REVIEW

A.

WHETHER AN (INDISPUTEDLY PRIVATE) INDIVIDUAL WHO (ARGUABLY) BECAME A *LIMITED* PUBLIC FIGURE UNDER GERTZ v. ROBERT WELCH, INC., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) AND ITS PROGENY CAN (EVER) LOSE THAT STATUS UNDER EXTANT (FEDERAL) PRECEDENT.

B.

ASSUMING AN INDIVIDUAL CAN LOSE (LIMITED) PUBLIC FIGURE STATUS, WHAT CRITERIA [i.e., PASSAGE OF TIME, LACK OF ACCESS TO THE MEDIA, CHANGE OF CIRCUMSTANCE, NATURE OF THE ALLEGED DEFAMING PUBLICATION, ETC.] MUST EXIST.

C.

WHETHER THE FLORIDA COURTS MISAPPLIED FEDERAL PRECEDENT AND THEREFORE DENIED PLAINTIFF FUNDAMENTAL RIGHTS IN DETERMINING (1) THAT PLAINTIFF WAS A LIMITED PUBLIC FIGURE; AND (2) THAT PLAINTIFF (ON THE FACTS PRESENTED) RETAINED (LIMITED) PUBLIC FIGURE STATUS.

## II.

## INTRODUCTION AND DESIGNATION OF PARTIES

The petitioner, ESTHER FRIEDGOOD, was the plaintiff in the trial court, was the appellant in the District Court of Appeal of Florida, Fourth District, and was (unsuccessful) petitioner in the certiorari proceedings to the Florida Supreme Court. The respondent, PETERS PUBLISHING CO., was the defendant/appellee/respondent. In this petition the parties will be referred to as the plaintiff and the defendant and, alternatively, by name. The symbol "A" will refer to the petitioner's rule-required appendix. All emphasis has been supplied by counsel unless indicated to the contrary.

III.

## TABLE OF CONTENTS


I. QUESTIONS PRESENTED FOR REVIEW .... I

II. INTRODUCTION AND DESIGNATION OF PARTIES ..... II

III. TABLE OF CONTENTS ..... III

IV. TABLE OF AUTHORITIES ..... IV

V. REFERENCE TO OPINION REVIEWED ..... 1

VI. BASIS FOR JURISDICTION ..... 1

VII. STATEMENT OF THE CASE AND FACTS—FEDERAL QUESTIONS RAISED, DETERMINED AND REVIEWED ..... 1

VIII. ARGUMENT ..... 16

IX. CONCLUSION ..... 22


## INDEX TO APPENDIX


BOOK REVIEW APPEARING APRIL 14, 1981, US MAGAZINE ..... A1

LETTER REQUESTING RETRACTION ..... A5

EXCERPTS FROM PLAINTIFF'S DEPOSITION ..... A7

FINAL SUMMARY JUDGMENT FOR DEFENDANT ..... A12

OPINION DATED FEBRUARY 24, 1988, FOURTH DISTRICT COURT OF APPEAL ..... A16

MOTION FOR REHEARING ..... A33

ORDER DENYING REHEARING ..... A44

NOTICE TO INVOKE DISCRETIONARY JURISDICTION, SUPREME COURT OF FLORIDA ..... A45

ORDER DENYING REVIEW ..... A47

## IV.

## TABLE OF AUTHORITIES

**Cases:**

*Brewer v. Memphis Publishing Co.*, 626 F. 2d 1238 (5th Cir. 1980) ..... 17

*Contemporary Mission, Inc. v. The New York Times Company*, 842 F. 2d 612 (2nd Cir. 1988) ..... 17

*Dameron v. Washington Magazine, Inc.*, 779 F. 2d 736 (D.C. Cir. 1985), U.S. Sup. Ct., cert. den. 476 U.S. 1141 (1986) ..... 18

*Friedgood v. Peters Publishing Co.*, 521 So. 2d 236 (Fla.App.4th 1988), cert. den. ..... So. 2d ..... (Fla. 1988) ..... 1

*Gertz v. Welch*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ..... 16, 18

*Meerpohl v. Nizer*, 560 F. 2d 1061 (2nd Cir. 1977) .... 17

*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ..... 20

*Street v. National Broadcasting Company*, 645 F. 2d 1227 (6th Cir. 1981) ..... 17, 19

*Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979) ..... 16, 20-21

**Other Authorities:**

28 U.S.C.A. 1257 ..... 1

28 U.S.C.A. 2101 ..... 1

U.S. Sup. Ct., Rule 20, 28 U.S.C.A. ..... 1

V.

## REFERENCE TO OPINION REVIEWED

The opinion herein sought to be reviewed was rendered by the District Court of Appeal of Florida, Fourth District [A16-32], now reported, See: *Friedgood v. Peters Publishing Co.*, 521 So. 2d 236 (Fla.App.4th 1988), with Florida Supreme Court review denied, *Friedgood v. Peters Publishing Co.*, ..... So. 2d ..... (Fla. 1988) [A47, 48].

VI.

## BASIS FOR JURISDICTION

Plaintiff invokes this Court's jurisdiction pursuant to 28 U.S.C.A. 1257(3) under the time schedule as authorized in 28 U.S.C.A. 2101(c) and U.S. Sup. Ct. Rule 20, 28 U.S.C.A.

Application for review to the Florida Supreme Court was denied on August 29, 1988 [A47] and no application for extension of time has herein been requested.

VII.

## STATEMENT OF THE CASE AND FACTS— FEDERAL QUESTIONS RAISED, DETERMINED AND REVIEWED

### A.

Leonard Levitt, a reporter for the Long Island newspaper, "Newsday", wrote a series of articles detailing the events surrounding the 1975 death (at the hands of

her husband, Dr. Charles Friedgood, a surgeon) of Sophie Friedgood. In late *1980* Mr. Levitt published a non-fiction book regarding Dr. Friedgood's life, entitled "The Healer —A True Story Of Medicine And Murder" (Viking Press). In March of 1981, Us (magazine) Editor, Richard Kaplan, gave freelance writer, Anita Shreve, a copy of "The Healer" to review for the magazine's book review section "Authorized." A book review was written [A1-3]. It is that book review which formed the basis for the subject litigation.

The book *review* contains a photograph of the plaintiff above the printed caption:

> *"The Accomplice"*: Esther Friedgood hid evidence of the crime in an upstairs file cabinet at her father's request."

The book *review* contains a photograph of Toba Friedgood with the following caption:

> *"The Confidante"*: Only Toba Friedgood was privy to her *sister's horrible*—and *criminal*—secret."

The book *review* contains the following statement:

> "When the police arrived with a search warrant, Friedgood *confided in his daughter*, Esther, and convinced her to hide the evidence, thus *involving her* in the *murder*."

It being at all times undisputed that plaintiff had no prior knowledge concerning her father's actions and, distraught over the published assertions that she was an "accomplice" to the murder of her mother, plaintiff demanded retraction [A5, 6]. After the defendant *refused* to retract the statements, plaintiff sued. The case ter-

minated, after extensive discovery, upon trial court entry of the following order:

• • •

"By the defendant's renewed motion, the court is requested to reconsider the issue of the plaintiff's status as a public official or public figure in light of the recently decided case of *Della-Donna v. Gorr Newspapers Company*, 489 So. 2d 72 (Fla. 4th DCA 1986) *in addition to* other recent decisions from the United States Supreme Court.

"This case is a libel action in which the plaintiff alleges that a book review appearing in Us magazine, published by the defendant, defamed her. A copy of the book review is attached to the plaintiff's complaint as 'Exhibit A' (D.E. 1). In order to determine if the plaintiff is a limited-purpose public figure, the court must find that there was a public controversy, that the plaintiff played a sufficiently central role in that controversy, and that the alleged defamation was germane to the plaintiff's involvement in the controversy.

"There is no question that *medical malpractice and incompetence was a hotly-debated topic in 1981*. Sizeable and varied groups in society have different, strongly-held views. The alleged defamatory article is *a book review* of *The Healer* by Leonard Levitt. The reviewer writes about Dr. Charles Friedgood's conviction for the murder of his wife Sophie (the plaintiff's mother), and about Levitt's criticism of the medical profession for failing to discipline Dr. Friedgood for gross malpractice committed prior to the murder. The legality in New York State of

doctors signing their relatives' death certificates; the existence of a code of silence in medical circles whereby physicians fail to report gross negligence of their colleagues; the lack of discipline in general within the medical community; the prospect that a physician-murderer could obtain hospital privileges: the fact that a physician guilty of gross malpractice was allowed to continue in practice and ultimately kill his wife—*all these issues constitute enough of a public controversy* to satisfy the test in *Waldbaum v. Fairchild Publications*, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

"Esther Friedgood played a central role in the *public controversy concerning the investigation and conviction of Dr. Friedgood for his wife's murder.* The record before the court is filled with actions by the plaintiff where she *voluntarily injected herself* into a prominent position in the investigation of her mother's murder and ultimate conviction of her father at trial. Among other activities, *she spoke with the police after the murder*, concealed Demerol and a syringe at her father's request during a police search of her family home, *consulted with two different attorneys*, discovered that her father attempted to leave the country with her mother's jewels, *was interrogated by the police after being granted immunity from prosecution for concealing evidence of a crime, and ultimately testified against her father after fighting extradition from Florida.*

"The alleged defamatory article was germane to the plaintiff's involvement in the controversy. Extensive publicity was generated by the Friedgood trial

in New York City and Long Island. Esther Friedgood's testimony was crucial to a successful prosecution of her father, and such publicity focused specifically upon her. *The plaintiff was described as an 'accomplice' because she in fact did hide evidence of the crime in an upstairs file cabinet at her father's request.* She was 'involved' in the murder when she hid evidence at the time the police arrived at the family home with a search warrant. The plaintiff's sister Toba broke her promise to Esther and ultimately told the police about Esther's concealment of the viles [sic] and syringe. The alleged defamatory statements within the review were clearly relevant to the plaintiff's involvement in the investigation of her mother's murder and in her father's conviction.

"If Della-Donna is a limited public figure under the test in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), then certainly Esther Friedgood is a limited public figure as defined in *Gertz* and thoroughly analyzed and articulated in *Della-Donna.* The court hereby finds that Esther Friedgood is, therefore, a *limited public figure.*" [A12-15].

* * *

The trial court, finding no evidence of *actual* malice, entered judgment for the defendant [A12-15].

Plaintiff appealed to the District Court of Appeal of Florida, Fourth District, which court (in a lengthy opinion) affirmed. The court stated, inter alia:

* * *

"The underlying facts of this case are undisputed and reflect a family tragedy culminating in a mother's

death at the hands of the father by poisoning, the father's subsequent efforts to avoid detection, and his attempts to misuse his emotionally vulnerable children in those efforts. Dr. Charles Friedgood and his wife Sophie lived in Kensington, Long Island. They had had six children who, by June of 1975, were grown and not living at home. Dr. Friedgood had a lucrative medical practice but had run afoul of the tax laws and the abortion laws. He also had a mistress who had given birth to his two out-of-wedlock children. Esther and her husband had just graduated from law school and were planning to visit Esther's parents the same day Dr. Friedgood was later determined to have *killed his wife* by injection with Demerol.

"Dr. Friedgood signed his wife's death certificate stating the cause of death was stroke. Mrs. Friedgood had had a stroke years earlier, but had almost entirely recovered from it. The assistant district attorney was suspicious of the fact a husband had signed the death certificate of his wife. The family was already in Hazelton, Pennsylvania, Mrs. Friedgood's hometown and prospective burial place, when the burial was stopped by court order and an autopsy performed because of the police suspicion. The autopsy revealed no evidence of stroke, and tissue and organ samples were taken before burial proceeded. When the family returned to Kensington they found a police detective waiting who asked the maid, Lydia, to go with him to the police station for questioning. Esther volunteered to go with her. At the station, the assistant district attorney questioned Esther about Dr. Friedgood's private life. She told him about her

father's mistress and the two out-of-wedlock children and also disclosed her father's financial problems and tax evasion conviction.

"After toxicologists determined that Mrs. Friedgood died of a massive overdose of Demerol, the district attorney obtained a search warrant for Demerol bottles and a hypodermic syringe at the Friedgood home. He and several detectives went to the home with the warrant. Esther answered the door and went to get her husband and Dr. Friedgood. The detectives then showed the warrant and began the search while the family members waited on the porch with friends who were making a condolence call. Dr. Friedgood, standing in the living room doorway, unsuccessfully attempted to speak to Esther in Yiddish. Finally he told her cryptically in English that bottles and syringe were in an upstairs file cabinet. Esther told her sister Beth that their father wanted Beth to get these items, but Beth refused. Esther then went upstairs by a back stairway and took the items from the top drawer of the file cabinet in her father's den, secreting them in her clothing. She went downstairs, then back up to her sister Toba's room and showed her the items. Esther later testified that *it was then that Toba told her that the police were looking for Demerol.* Esther put the items in a bag and later showed them to her husband, who noticed the word Demerol on the bottle.

"After the police left, Esther's husband called Dr. Friedgood's attorney, John Palmer. Esther, Richard and Toba met with Palmer later in the day, but

Palmer said he had a conflict of interest and could not advise them. When the trio returned to the house Esther washed all fingerprints from the items, put them back in the bag and put the bag in a coat pocket in a closet. On her father's inquiry she told him where they were. Some days later, when Esther checked the coat pocket, the items were gone. Three days after the police search of the Friedgood home, Dr. Friedgood called home from Kennedy Airport to say he was leaving his car there and was going away for a few days' rest. His daughter Dvorah's husband called the assistant district attorney, and Dr. Friedgood was removed by police from a London-bound airplane, already out on the runway. He was carrying a large bag. Esther seized the bag after Friedgood was returned to the house by his attorney. In it she found substantial and valuable personal property of her mother, which she dispersed to various hiding places. Later she returned them to the bag and turned it over to her father-in-law, who had an attorney inventory the items.

"Two weeks later, Esther's sister Toba, after revealing to maternal relatives the information about Esther's concealment of the bottles and syringe, went to the police with the same information. The police then went to the house and told Esther they thought she was guilty of obstruction of justice by her actions. She called a lawyer with the firm for which her husband was clerking, and accompanied the police to the station at their request. Her husband's law firm asked Jonathan Rosner, a criminal attorney, to represent her and he went to the station

house. According to Rosner, the assistant district attorney told him Esther had been arrested for being an accessory after the fact in her mother's killing. Rosner was concerned about the impact of the charges on her legal career as well as on her and her husband personally. Ultimately, Rosner reached an understanding with the assistant district attorney: If Esther voluntarily gave a truthful statement, there would be no arrest record, and she would be free to go. Esther gave the statement. The assistant district attorney stated for the record that the chief assistant district attorney had authorized him to say she would not be prosecuted; Rosner elaborated for the record, on the understanding reached, to indicate there was to be no formal record of her being arrested by the officers.

"Subsequently Esther, her husband and her sisters testified before the grand jury. Dr. Friedgood was indicted and eventually tried. Esther testified against him, but only *after resisting extradition from Florida on the ground she feared injury to the baby she was carrying.* Dr. Friedgood's trial was highly publicized. Media articles told of Esther's hiding the hypodermic and Demerol bottle during the police search of the house, her discovery of her mother's property in her father's bag at the time of his aborted flight attempt, Toba's telling the assistant district attorney about Esther's concealment of the evidence, and other matters. Dr. Friedgood told a newspaper reporter his children had set him up for the conviction so they could inherit their mother's estate; that Esther was 'misinformed' about the finding of the bottles and syringe, and that he was trying to secrete

his wife's valuables on Esther's advice, in order to keep the IRS from getting them. Dr. Friedgood was convicted of second degree murder and second degree grand larceny and sentenced to 25 years to life in prison.

"In 1980, Leonard Levitt, a news reporter who had covered the story extensively, published a book about Dr. Friedgood's career and the murder of his wife. Its thrust was to use the Friedgood case to suggest that members of the medical profession covered up for each other—even for a chronic malpractioner. Anita Shreve, a free lance writer, was asked by the editor of Us magazine to write a review of this book. Ms. Shreve read the book, interviewed the author, and submitted her review to the editor. *Kaplan assigned a researcher, Vicki Jo Radovsky, to check the facts. Radovsky wrote the captions under the photographs obtained by Us to accompany the review and submitted the package to Kaplan for approval. The review together with pictures and captions appeared in the April 14, 1981, issue of Us.* The pictures were obtained from the publisher of the newspaper, *Newsday*, in which Levitt's original news articles on the case had appeared. The same photos appeared on the dust jacket of Levitt's book."

* * *

After next stating the respective (legal) positions of the parties, the Court turned to federal precedent for its analysis of the limited public figure issues:

* * *

"*Both sides have cited cases* finding or rejecting public figure status for plaintiffs in a variety of

factual settings, *most of which we find dissimilar to the facts presented here. We also reject the publisher's claims that Esther's status as a lawyer or as a one-time candidate for a local public office controls the outcome* here. Rather, we believe the central issue is whether Esther's role in her father's criminal case was sufficient to make her a public figure for purposes of the defamation law and *whether that status continued even after the criminal prosecution was terminated.*

"In *Street v. National Broadcasting Company*, 645 F. 2d 1227 (6th Cir. 1981) the plaintiff was the alleged white rape victim in the widely publicized Scottsboro Nine case where nine Southern black youths were accused of rape in 1931. In the course of that litigation the plaintiff was the focus of numerous press interviews and her version of the case was widely disseminated outside of actual courtroom testimony. After the litigation she disappeared from public view. A defamation suit was brought more than 40 years later after NBC televised a dramatization of one chapter of the book *Scottsboro: A Tragedy of the American South* by an historian, Dr. Daniel Carter. The book was based on the trial court's findings at the 1933 trial of one of the defendants, the transcript of the trial, contemporaneous newspaper reports of the trial and interviews with the trial judge and others. The book suggests that Street's testimony was false. The plaintiff claimed she was a private figure and that even if she had been a public figure at the time of trial, she had long since resumed her role as a private figure. The court rejected both claims.

## DURABILITY OF PUBLIC FIGURE STATUS

"The plaintiff in *Street* also argued, as does the appellant here, that even if she was a public figure at the time of the 1930's trial, she lost her public figure status over the intervening forty years. The 6th Circuit held:

> We reject this argument and hold that once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later *commentary or treatment of that controversy.*

(Emphasis supplied.) *Street*, at 1235, citing *Brewer v. Memphis Publishing Co.*, 626 F. 2d 1238 (5th Cir. 1980) (plaintiff sued when a newspaper implied that she was reviving a long-dormant relationship with Elvis Presley); *Meerporl v. Nizer*, 560 F. 2d 1061, 1066 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978) (sons of Julius and Ethel Rosenberg are public figures for purposes of subsequent commentary on Rosenberg trials since they spent their earlier years in the limelight). The *Street* court's rationale on this issue is well reasoned:

> Our analytical view of the matter is based on the fact that the Supreme Court developed the public figure doctrine in order that the press might have sufficient breathing room to compose the first rough draft of history. It is of no less importance to allow the historian the same leeway when he writes the second or the third draft. . . . A contrary rule would tend to re-

> strain efforts to shed new light on historical events and reconsideration of past errors.

*Street*, at 1236.

## THE FRIEDGOOD CASE

"In applying the above analysis to the present case, we believe important parallels can be drawn. As a starting point we note that both involved public criminal trials which the public and the press had a constitutional right to attend and to freely disseminate information gained by attendance. Although it cannot be denied that the Scottsboro trials were far more significant in a political, social, and legal sense than was the murder trial of Dr. Friedgood, the fact remains that both cases were initially highly publicized criminal prosecutions out of which other political and/or legal issues arose. The Friedgood prosecution and its attendant publicity was analogous, albeit on a much smaller scale, to the circumstances surrounding the Scottsboro case. Like the plaintiff in *Street*, Esther Friedgood was the prosecution's star witness. Without her testimony, the state would have had considerable difficulty in convicting her father for her mother's murder. In addition, the record reflects that both Street and the appellant at bar had ample 'access to channels of effective communication and hence . . . a . . . realistic opportunity to counteract false statements.' *Street*, at 1234, quoting *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009. The newspaper clippings in the record reflect numerous instances where appellant had granted interviews, including a long series published in 'Sunday Newsday.'

"Finally and most importantly, it appears to be undisputed in this case, unlike *Street*, that Esther, by her voluntary actions, thrust herself into the criminal investigation and prosecution of her father. She was made aware soon after her mother's death of the police suspicions of her father. Even if she could be deemed to be unaware of the significance of the demoral and syringe at the actual moment that she removed them from her father's office, the record shows that immediately after finding them she was told by her sister that it was those very items that the police were seeking. Consequently, whether she actually believed at the time that her father was the murderer was irrelevant to the issue that she voluntarily chose to conceal evidence for which she knew the police were searching. Her actions in hiding the items from the police, wiping off the fingerprints, and concealing the items in a place which she then disclosed to her father, can be characterized, at the very least, as conduct destined to inject her deeply into the murder investigation and prosecution. Her subsequent concealment of the contents of the suitcase her father had attempted to remove from the country in his aborted flight to Denmark also reflects her continued participation in the critical events leading up to her father's trial and conviction. In our view all of these actions justify her designation as *a limited public figure for purposes of comment about the Friedgood trial based upon the Street analysis which applies the Gertz rationale.*

"We also believe, for the same reasons set out by the court in *Street*, that *Esther retained her status as a public figure even after the criminal trial of her*

*father had ended.* We have already discussed the facts underlying our conclusion that a public controversy was involved. Unlike *Street*, we do not have a 40-year interval *but rather one of a few years.* Esther's father remains incarcerated and, the record reflects, still professes his innocence. *It would seem reasonable under these circumstances to conclude that public discussion about the case may continue.* Accordingly, in our view appellant should be deemed a limited public figure for purposes of the comment about her *in the book review.* Under this analysis, reports about Esther's conduct during the time of the criminal investigation and trial would be protected and, to sustain a defamation action, Esther would not only have to prove that the reports were false and defamatory but also that they were made with actual malice towards her."

* * *

Plaintiff's motion for rehearing was denied, as was petition for "conflict" certiorari to the Florida Supreme Court [A33-43, 44, 45, 47].

This proceeding follows.

B.

The constitutional issues herein involved have been extensively litigated from the inception:

1. The trial court terminated the litigation after determining that "Esther Friedgood is a limited public figure as defined in *Gertz*. . ." [A15] and that no genuine issue of material fact exists from which a reasonable jury could find actual malice by clear and convincing evidence [A15];

2. The appellate court affirmed the trial court after resolution of what that court determined to be the central issue:

> "WHETHER ESTHER'S ROLE IN HER FATHER'S CRIMINAL CASE WAS SUFFICIENT TO MAKE HER A PUBLIC FIGURE FOR PURPOSES OF THE DEFAMATION LAW AND *WHETHER THAT STATUS CONTINUED EVEN AFTER THE CRIMINAL PROSECUTION WAS TERMINATED.*" [A24].

VIII.

## ARGUMENT

A.

### The Basis for Review

In *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979), this Court (in footnote number 7) reserved for another day the issue:

> "WHETHER OR WHEN AN INDIVIDUAL WHO WAS ONCE A PUBLIC FIGURE MAY LOSE THAT STATUS BY THE PASSAGE OF TIME." 443 U.S. at 165, 61 L. Ed. 2d at 459.

In *Wolston* this Court reaffirmed the principles announced in *Gertz v. Welch*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) and reminded:

> ". . . The instances of truly involuntary public figures *must be* exceedingly *rare*." 418 U.S. at 345, 41 L. Ed. 2d at 808.

Because by definition *limited* public figures (ultimately) return to the anonymity of private life [unless circumstances demonstrate otherwise, See: *Contemporary Mission, Inc. v. The New York Times Company*, 842 F. 2d 612 (2nd Cir. 1988) and cases cited therein] courts should not give a negative answer to the question: Whether an individual who was once a public figure may lose that status? without consideration of other circumstances. Indeed, the period of time herein involved pales in comparison to the rather extensive periods found in *Contemporary Mission, Inc. v. The New York Times Company*, supra; *Street v. National Broadcasting Company*, 645 F. 2d 1227 (6th Cir. 1981); *Brewer v. Memphis Publishing Co.*, 626 F. 2d 1238 (5th Cir. 1980) and *Meerpohl v. Nizer*, 560 F. 2d 1061 (2nd Cir. 1977). Yet if one considers (in addition to the "time" period) other extant factual circumstances, the constitutional infirmity in the result herein reached is exposed.

The Florida *trial court* decided the subject issue by stating that because Levitt's *book* concerned a "hot topic", to-wit: a medical malpractice crisis (in 1981), plaintiff remained "fair game" for the book's REVIEWER! That court gave no credence to any other factors. That court determined that because plaintiff was "involved" during the criminal proceedings, comment forever was constitutionally permissible.

The *appellate court* decided that the book *reviewer* was constitutionally protected *because*:

> ". . . Unlike *Street*, we do not have a 40-year interval but rather one of a few years. Esther's father remains incarcerated and, the record reflects, still professes *his innocence*. It would seem reason-

> able under these circumstances to conclude that public *discussion* about the case may continue. Accordingly, in our view appellant should be deemed a limited public figure for purposes of the comment about her in the book *review*. . ." [A30].

With due respect for the reasons advanced (by both Florida courts), neither court recognized the significance of plaintiff's status as a *limited* public figure while both courts premised resolution of the issue on a (singular) *tenuous* premise, to-wit: the "mere" time period involved. Because a state court has decided an important question of federal law which has not been (but should be) settled by this Court, this Court's power of supervision is requested.

B.

**Reasons for Granting the Writ**

Esther Friedgood is one of several children in a family wherein the father murdered the mother and, as an expected consequence, there ensued a police investigation. While the matter of murder is always of public *interest*, there exists generally (and in this case there existed *specifically*) very little "debate" or "public controversy" surrounding same. Under the circumstances the question of plaintiff's "involvement" is more a matter of semantics than anything else. Conceding, however, for purposes of this proceeding that persons who become "involved" in public controversies or affairs *can be raised involuntarily* to the status of a *limited* public figure, See: *Gertz v. Welch*, supra, and *Dameron v. Washington Magazine, Inc.*, 779 F. 2d 736 (D.C. Cir. 1985), U.S. Sup. Ct., cert. den. 476 U.S 1141 (1986), the next logical inquiry asks:

**Whether or When Such Status Can Be Lost?**

In its opinion the Fourth District resolved the issue of whether or not plaintiff herein "lost" limited public figure status by "drawing parallels" between this case and *Street v. National Broadcasting Company*, supra, a case wherein plaintiff was the alleged white rape victim in the widely publicized Scottsboro Nine case where nine southern black youths were accused of rape in 1931. Although the facts of this case are in nowise similar (to *Street*), the Florida court applied (to this case) the "*Street* rationale" which it directly quoted as follows:

> "Our analytical view of the matter is based on the fact that the *Supreme Court* developed the public figure doctrine in order that the *press* might have sufficient breathing room to compose the first rough draft of history. It is no less important to allow the *historian* the same leeway when he writes the second or the third draft. . . A contrary rule would tend to restrain efforts to shed new light on historical events and reconsideration of past errors." *Street*, supra, 645 F. 2d at p. 1236 [A27, 28].

With due deference to the Fourth District, plaintiff's dispute is not with the author of the book who "arguably" was "recording history." Plaintiff's rights were violated by the book's *reviewer*—whose motives will never be exposed given the nature of the rulings herein made. Simply stated, given the accuracy of the book—the *review*, with its attendant photographs and *attention grabbing captions*, was neither fair nor accurate!

Sight should not be lost of the fact that, in this case, plaintiff was married and was living away from home at

the time of her mother's death. Aside from that relatively short period of time (post-crime) in which plaintiff by necessity remained in New York, plaintiff resided elsewhere. Save for her involuntary return to New York to testify at her father's trial, she resided in Florida where she lived, and lives, as a wife, mother and career person, apparently returning *successfully*—as the Fourth District *implicitly* recognized—to private life:

> "We also reject the publisher's claims that Esther's status as a lawyer or as a one-time candidate for a local public office controls the outcome here. . ." [A24].

The opinion herein sought to be reviewed drew "parallels" between this case and the federal cases cited therein, and in so doing the court misapplied and misperceived the very principles it sought to embrace.

If it is true—as this Court stated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) that the public figure doctrine is based upon "a profound national commitment to the principle that *debate on public issues* should be uninhibited, robust and wide open. . .", *New York Times*, 376 U.S. at 270—and if it is further true—as this Court explained in *Wolston v. Reader's Digest Association, Inc.*, supra—that one of the reasons why the rationale for extending the *New York Times* rule to public figures included recognition that public figures "usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements", *Wolston*, supra, 443 U.S. at

p. 164, then this Court should exercise its discretion and take jurisdiction of this matter because the constitutional protections afforded a publisher should not be applied blindly especially where, as here, there is not the slightest suggestion that history was being chronicled, reported or digested. The nature of the alleged defaming publication was a book review where the reviewer chose to comment, classify and characterize what was already "reported." As a consequence, this Court should review the merits herein and ultimately hold that:

1. A *private* individual who becomes a limited public figure *can*, under federal precedent, lose that status.

2. In determining whether or not public figure status "has been lost", the time period involved may be considered *along with* other considerations in the case; and,

3. Such considerations may include the plaintiff's access to the media at the time the alleged defamation occurred, the nature of the alleged defaming publication, plaintiff's change of circumstances, if any, as well as any other factor bearing on the plaintiff's "ability":

> ". . . to counter criticism and expose the falsehood and fallacies of defamatory statements." *Wolston*, supra, 443 U.S. at p. 164.

This Court should assume jurisdiction over the instant cause and further determine that the Florida courts misapplied federal precedent and denied plaintiff fundamental rights in determining (a) that plaintiff was a limited public figure; and (b) that plaintiff (on the facts presented) retained limited public figure status.

## IX.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, the plaintiff respectfully urges this Honorable Court to exercise its discretion by reviewing the merits of this case.

Respectfully submitted,

HORTON, PERSE & GINSBERG

and

HOPPE, BACKMEYER & NELSON

410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

*Attorneys for Petitioner*

By: ARNOLD R. GINSBERG

# AUTHOR-IZED

**By Anita Shreve**

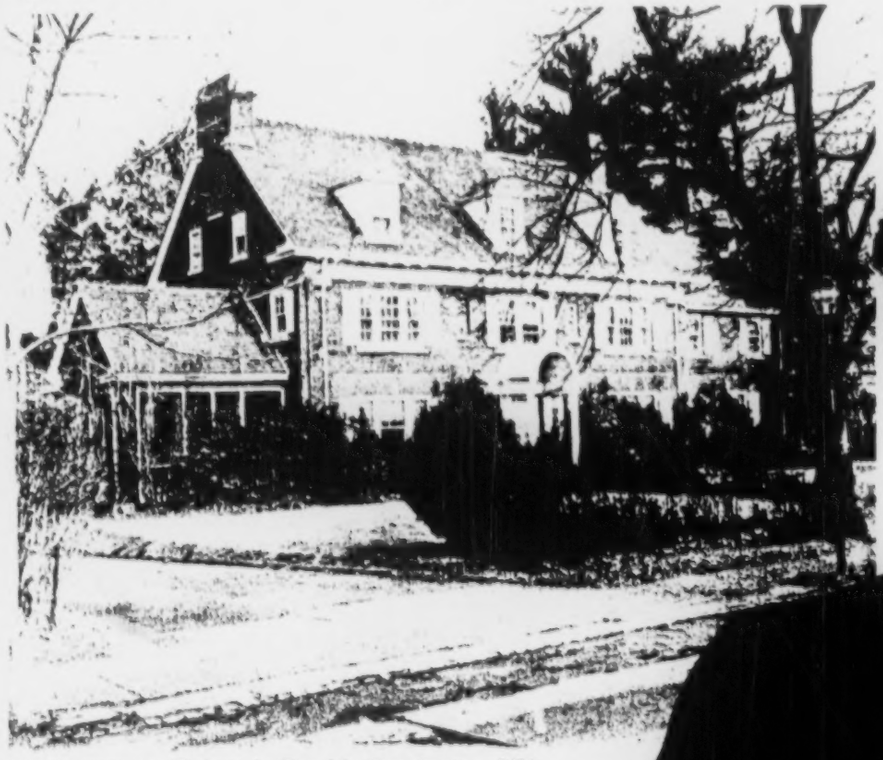
On June 17, 1975, Dr. Charles Friedgood, a surgeon, murdered his wife, Sophie, in the bedroom of their Kensington, NY, home by injecting Demerol into her veins. The next morning, feigning surprise and grief, he signed her death certificate. His subsequent arrest and conviction, the bizarre facts surrounding the murder—and, more significant, Dr. Friedgood's past—have lifted the lid on a massive cover-up of malpractice that Leonard Levitt calls a "medical conspiracy" in his new book, *The Healer* (Viking, $12.95).

Not only was Charles Friedgood convicted of murder and sentenced to 25 years to life in prison, but the New York state legislature recently passed the "Dr. Friedgood Bill"—which makes it illegal for doctors to sign the death certificates of relatives. The murder also led to Levitt's detailed and lengthy investigation of what has been called a "code of silence" in the medical profession—a code that affects every person who enters a hospital or a doctor's office for treatment or surgery.

When Levitt, then a reporter for the Long Island newspaper Newsday, began investigating the Friedgood case at the time of the murder, he regarded it as just another homicide. Six years later, however, Levitt, 39, is still visibly angry when he speaks of Dr. Friedgood, the physician's sleazy medical history, the unwillingness of Friedgood's colleagues to blow the whistle on him—and the hundreds of other Charles Friedgoods at large.

"The medical profession is a network of individuals whose primary loyalty is to each other and not to the public," he says. "And there are no watchdogs. Here you had a guy who had been thrown out of medical school and dismissed from virtually every hospital he had worked at—yet no one stopped him."

In Levitt's book, Friedgood's



Newsday

The house: At 47 Beverly Road in Kensington, NY.

UPI

The perpetrator: Dr. Charles Friedgood murdered his wife on June 17, 1975, and the next morning, feigning surprise and grief, signed her death certificate. Police nabbed him only moments before his plane took off for Denmark, where he planned to rendezvous with his mistress.

UPI

A1

# Reporter Leonard Levitt opened a can of worms—and changed state law—when he exposed the case of the murderous medico

colleagues and friends—from high school onward—paint a picture of him as a pathological liar.

Friedgood was expelled from medical school for forging a recommendation; he lied about his military service, wormed his way back into medical school and bounced from one hospital to another, leaving a trail of botched and unethical surgery. Eventually, he wound up in the Medicaid slums of New York, where he operated on poor patients ten, 15, sometimes 20 times, protected by their ignorance of the procedures involved.

He also operated out of his field: Trained as a thoracic surgeon, he nevertheless performed operations ranging from intestinal bypasses to breast implants.

The victim: Sophie Friedgood died after her husband injected her with enough Demerol to kill a horse.

Despite his abysmal job history, says Levitt, Friedgood could always find a new hospital to provide facilities. And, to Levitt's astonishment, no written record exists of the reasons for Friedgood's numerous dismissals. He appears to have moved from hospital to hospital with ease. Even while on trial for the murder of his wife, Friedgood was allowed to continue as a surgeon at a local hospital; the hospital, in fact, opened an hour early so he

Newsday

The accomplice: Esther Friedgood hid evidence of the crime in an upstairs file cabinet at her father's request.

The missing link: Finally, nightmare-tortured Debbie Friedgood persuaded Toba to go to the police and inform on Esther.

Newsday

The confidante: Only Toba Friedgood was privy to her sister's horrible—and criminal—secret.

Newsday

# AUTHOR-IZED

Kenneth H. Brief

**Author Leonard Levitt: "The medical profession's loyalty is to each other and not the public."**

could operate before dashing off to court.

Currently lobbying for a new trial, Friedgood, 63, is reportedly still practicing medicine in prison. If he wins his appeal for a new trial and is acquitted (the appeal is scheduled to be heard in the next few months), he could reapply for a license outside New York and be back at the operating table in a matter of months. It's a prospect that appalls author Levitt, who doesn't doubt for an instant that Friedgood could find hospitals at which to work.

What's needed, says Levitt, "is a national clearinghouse that lists the reasons for all physician dismissals from hospitals. It should be a matter of public record why a doctor has been dismissed from a hospital and why he is being taken on at a new one."

Levitt contends that the code of *omerta*, or silence—usually associated with the Mafia—exists in medical circles as well. After the appearance of the Newsday articles and Levitt's book, scores of doctors called him to corroborate what he had written—but all insisted on anonymity. "Every doctor has a story about some colleague who shouldn't be practicing," says Levitt. "But they all say, 'What can I do?' And they all insist that their names not be used."

Levitt believes that the rarefied atmosphere in which doctors live and work contributed to Friedgood's arrogance in assuming he would get away with his crime. He not only gave his wife enough traceable Demerol to kill a horse, and against professional ethics signed her death certificate, but he then left the murder weapons—the syringe and the Demerol bottle—lying in an upstairs filing cabinet.

When the police arrived with a search warrant, Friedgood confided in his daughter, Esther, and convinced her to hide the evidence, thus involving her in the murder. Later she, in turn, confided in another sister, and they went to the police. Friedgood's plan was to escape to Denmark, where his mistress and their two children awaited him. He was finally arrested by the police as his plane was taxiing down the runway.

Levitt takes satisfaction from passage of the "Dr. Friedgood Bill." Previously, doctors had regarded it as bad form to sign relatives' death certificates—but it was not illegal to do so. Today, in New York, it is. But Levitt remains alarmed by the lack of discipline in the medical community. What he finds so incomprehensible is that Friedgood was not nabbed years earlier.

The journalist compares Friedgood's case to that of a policeman. If a cop is discharged from the police force, says Levitt, he will find it virtually impossible to find work in a police department anywhere else. Not so in the medical profession. As Friedgood demonstrated, doctors can relocate at will—with a clean bill of health.

"I suspect that there are lots of Friedgoods out there," says Levitt, "but it's not just that there are lots of them; the point is that there's really no way for the public to identify them.

"We're at step one—educating the public," he says. "It's consciousness-raising time. After that, it's up to the legislatures. But frankly," he adds, dismayed by what he considers an impenetrable wall, "we're not even close to a solution." **US**



A3

## LETTER REQUESTING RETRACTION

*MONTGOMERY, LYTAL, REITER*
*DENNEY AND SEARCY*
Professional Association
Attorneys at Law
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409

July 31, 1981

U.S. Magazine
Peters Publishing Company
Division of Concentric Enterprises, Inc.
215 Lexington Avenue
New York, New York 10016

Re: U.S., Volume V, Number 8, "Author-ized: The Healer" by Anita Shreve

Dear Sirs:

Please be advised that this law firm has been retained to represent the interests of the former Esther Friedgood, now Mrs. Richard Zaretsky, in all matters regarding the above referenced article published in your issue of April 14, 1981.

On page 33 of that issue there appears a photograph of Mrs. Zaretsky above the following caption:

> The accomplice: Esther Friedgood hid evidence of the crime in an upstairs file cabinet at her father's request.

On page 34 of the text of the accompanying article indicates that Dr. Charles Friedgood confessed the murder

of his wife to his daughter, Esther, after which she knowingly concealed the murder weapons.

These statements are untrue and highly injurious to the personal reputation of Mrs. Zaretsky, who is a respected member of this community. The imputation of criminal conduct is particularly damaging to Mrs. Zaretsky's professional status as an attorney.

Accordingly, pursuant to Florida Statute § 770.01, you are hereby placed on notice of the false and defamatory nature of the statements, and we demand on behalf of Mrs. Zaretsky that within ten (10) days of your receipt of this letter you publish a full and fair correction, apology and retraction. The provisions of Florida Statute § 770.02 require that publication of the retraction be in as conspicuous place and type as was the original defamatory statement.

Very truly yours,

/s/ John Scarola
JOHN SCAROLA

JS:ma

cc: Richard Zaretsky, Esq.

Certified Mail No. P34 2666855

## EXCERPTS FROM PLAINTIFF'S DEPOSITION

IN THE
FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

---

CASE NO. 81-4625-CA (L) 01 Z

---

ESTHER FRIEDGOOD,
Plaintiff,

vs.

PETERS PUBLISHING CO., a Division of
Cencentric Enterprises, Inc., a
foreign corporation,
Defendant.

---

THE DEPOSITION OF ESTHER FRIEDGOOD
TAKEN AT THE INSTANCE OF
THE DEFENDANTS

---

West Palm Beach, Florida,
Wednesday, April 25, 1984
10:11 - 2:30 o'clock, a.m.

---

APPEARANCES:

LAW OFFICES OF HENRY L. KAYE, ESQ.
1655 Palm Beach Lakes Boulevard
Suite 900
West Palm Beach, Florida 33401
Attorney for the Plaintiff

STEEL, HECTOR, DAVIS, BURNS
& MIDDLETON
1400 Southeast Bank Building
Miami, Florida 33131
Attorneys for the Defendant
BY: THOMAS R. JULIN, ESQ.

* * *

[4] * * * mean. Sometimes I have a tendency to run on and people generally like to step on the ends of my questions. And sometimes they come out a little murky, so please bear with me and give me a chance to complete some of my rambling type of questions.

Would you state your correct legal name?

A. Esther Ann Friedgood Zaretsky.

Q. You are the Plaintiff identified as Esther Friedgood in the Complaint in this action?

A. Yes.

Q. What is your residence address?

A. 2119 Embassy Drive, West Palm Beach, Florida.

Q. Where are you now employed?

A. I am self-employed.

Q. And what are you self-employed as?

A. As an attorney.

Q. And how long have you been an attorney?

A. Since 1975.

Q. Are you a member of the Florida Bar?

A. Yes.

Q. Are you a member of any other Bars?

A. No.

Q. Do you remember when it was in 1975 that you were admitted?

A. I was admitted in January of 1976.

* * *

[33] A. Well, I had two children and it was a lot more work than one.

Q. How old is your other child?

A. Now?

Q. When was your other child born?

A. '77.

Q. What month?

A. July. No, wait a minute. When was she born? She was born in '76. July 27th, 1976.

Q. Now, was 1980 a better year economically for you?

A. Yes.

Q. Can you give me a ball park figure on your income for that year?

A. Probably back up to twelve.

Q. '81?

A. I don't think it grew like it should have.

Q. Why should it have grown in 1981? Did you expect it to grow in 1981?

A. Sure.

Q. Why?

A. Because I was working. There was no reason why it didn't that I knew of.

Q. Do you have any idea what the income was? Was it about twelve thousand or was it more than that?

* * *

[36] A. No.

Q. This is during the time I think you said that you were with your son and were working at home?

A. '79. That is when my son was born.

Q. I'm sorry. Why are you practicing in Florida rather than in New York?

A. We came down here to take the Florida Bar in 1975.

Q. When in 1975?

A. September. We came down to study. We were going to study for a month and a half before the exam and we liked the weather and the life style down here and we decided to settle here.

Q. Any other reasons that you came to Florida?

A. It was just a quieter life style than what we had experienced up north.

Q. Let me ask you specifically what you mean by what you had experienced up north?

A. Well, the last couple of months were very difficult months for me. When we came to Florida I felt that it was more peaceful.

Q. I know that some of the answers to these questions are obvious and it seems that they should be obvious to me, but let me just for the record ask you.

Why were the last couple of months in New [37] York difficult for you?

A. After we graduated and finished law school my mother died and then there was the investigation and the trial and the publicity and the family pains. It was just very difficult.

Q. Was there a substantial amount of publicity about your father's trial in New York?

A. Yes.

Q. Before your mother's death, had you ever considered practicing in New York?

A. New York?

Q. Yes.

A. We had talked about being admitted to New York, New Jersey and Florida.

Q. Why were you considering those three states?

A. Because that's where we had contacts. We thought we could get business.

Q. Did you have any sort of definite plans to open offices in any one of those three states?

A. No, we had just finished school. Everything was just speculation.

Q. Had you been interviewing with law firms when you finished law school?

A. I did go on some interviews.

Q. In what states?

* * *

IN THE
CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH
COUNTY.

CASE NO. 81-4625 CA (L) J

ESTHER FRIEDGOOD,
Plaintiff,

vs

PETERS PUBLISHING CO., a Division of Concentric Enterprises, Inc., a foreign corporation,
Defendant.

**FINAL SUMMARY JUDGMENT FOR DEFENDANT**

This matter came before the court upon the defendant's renewed motion for final summary judgment filed on July 1, 1986 (D.E. 220). Hearing was held on August 27, 1986. Terry S. Nelson, Esq. appeared on behalf of the plaintiff, and submitted a written response to the defendant's renewed motion; Thomas R. Julin, Esq. appeared on behalf of the defendant.

On December 13, 1985 (D.E. 188), the court denied the defendant's motion for summary judgment; one of the allegations in that motion was that the defendant was entitled to a judgment as a matter of law because the plaintiff is a public figure and will not be able to demonstrate actual malice by clear and convincing evidence. By the same order, the court denied the plaintiff's motion for partial summary judgment (D.E. 121)

on the allegation of the plaintiff that she was never a public figure under constitutional definition.

By the defendant's renewed motion, the court is requested to reconsider the issue of the plaintiff's status as a public official or public figure in light of the recently decided case of *Della-Donna v. Gorr Newspapers Company*, 489 So. 2d 72 (Fla. 4th DCA 1986) in addition to other recent decisions from the United States Supreme Court.

This case is a libel action in which the plaintiff alleges that a book review appearing in Us magazine, published by the defendant, defamed her. A copy of the book review is attached to the plaintiff's complaint as "Exhibit A" (D.E. 1). In order to determine if the plaintiff is a limited-purpose public figure, the court must find that there was a public controversy, that the plaintiff played a sufficiently central role in that controversy, and that the alleged defamation was germane to the plaintiff's involvement in the controversy.

There is no question that medical malpractice and incompetence was a hotly-debated topic in 1981. Sizeable and varied groups in society have different, strongly-held views. The alleged defamatory article is a book review of *The Healer* by Leonard Levitt. The reviewer writes about Dr. Charles Friedgood's conviction for the murder of his wife Sophie (the plaintiff's mother), and about Levitt's criticism of the medical profession for failing to discipline Dr. Friedgood for gross malpractice committed prior to the murder. The legality in New York State of doctors signing their relatives' death certificates; the existence of a code of silence in medical circles whereby physicians fail to report gross negligence of their colleagues; the lack of discipline in general within the medical community; the prospect that a

physician-murderer could obtain hospital privileges; the fact that a physician guilty of gross malpractice was allowed to continue to practice and ultimately kill his wife-all these issues constitute enough of a public controversy to satisfy the test in *Waldbaum v. Fairchild Publications*, 627 F.2d 1287 (D.C.Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

Esther Friedgood played a central role in the public controversy concerning the investigation and conviction of Dr. Friedgood for his wife's murder. The record before the court is filled with actions by the plaintiff where she voluntarily injected herself into a prominent position in the investigation of her mother's murder and ultimate conviction of her father at trial. Among other activities, she spoke with the police after the murder, concealed Demerol and a syringe at her father's request during a police search of her family home, consulted with two different attorneys, discovered that her father attempted to leave the country with her mother's jewels, was interrogated by the police after being granted immunity from prosecution for concealing evidence of a crime, and ultimately testified against her father after fighting extradition from Florida.

The alleged defamatory article was germane to the plaintiff's involvement in the controversy. Extensive publicity was generated by the Friedgood trial in New York City and Long Island. Esther Friedgood's testimony was crucial to a successful prosecution of her father, and much publicity focused specifically upon her. The plaintiff was described as an "accomplice" because she in fact did hide evidence of the crime in an upstairs file cabinet at her father's request. She was "involved" in the murder when she hid evidence at the time the

police arrived at the family home with a search warrant. The plaintiff's sister Toba broke her promise to Esther and ultimately told the police about Esther's concealment of the viles [sic] and syringe. The alleged defamatory statements within the review were clearly relevant to the plaintiff's involvement in the investigation of her mother's murder and in her father's conviction.

If Della-Donna is a limited public figure under the test in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), then certainly Esther Friedgood is a limited public figure as defined in *Gertz* and thoroughly analyzed and articulated in *Della-Donna*. The court hereby finds that Esther Friedgood is, therefore, a limited public figure.

An examination of the entire record shows that no genuine issue of material fact exists from which a reasonable jury could find actual malice by clear and convincing evidence.

It is hereby ORDERED AND ADJUDGED that the plaintiff Esther Friedgood shall recover nothing from the defendant Peters Publishing Company, and that the defendant shall go forth hence without day.

DONE AND ORDERED this 24 day of September, 1986 in chambers at West Palm Beach, Palm Beach County, Florida.

/s/ Mary E. Lupo
Mary E. Lupo
Circuit Court Judge
(81-4625 CA (L) J

copies furnished:

Thomas R. Julin, 4000 Southeast Financial Center, Miami, FL 33131-2398

Terry S. Nelson, Suite 810, Concord Bldg., 66 W. Flagler Street, Miami, FL 33130

**OPINION DATED FEBRUARY 24, 1988, FOURTH DISTRICT COURT OF APPEAL**

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF

IN THE
DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1988

---

CASE NO. 4-86-2674.

---

ESTHER FRIEDGOOD,
Appellant,

v.

PETERS PUBLISHING CO., et al.,
Appellees.

---

Opinion filed February 24, 1988
Appeal from the Circuit Court for Palm Beach County; Mary E. Lupo, Judge.

Arnold R. Ginsberg of Horton, Perse & Ginsberg, and Hoppe & Backmeyer, Miami, for appellant.

Thomas R. Julin and Donald M. Middlebrooks of Steel Hector & Davis, Miami, for Appellee-Peters Publishing Co.

ANSTEAD, J.

This is an appeal from a final summary judgment entered in favor of the defendant publishing company in a defamation action brought by the appellant, Esther Friedgood. We affirm.

Esther Friedgood filed a defamation complaint against Peters Publishing Company, publisher of Us magazine, alleging as defamatory comments about her contained in a review of a book concerning her father, Dr. Charles Friedgood, who had been convicted of the murder of his wife, Esther's mother. Relying on this court's opinion in *Della-Donna v. Gore Newspapers Company,* 489 So.2d 72 (Fla. 4th DCA 1986), the trial court held that Esther was a "limited public figure" under the defamation law and was required to prove not only that the published comments about her were false and defamatory but were published out of motives of "actual malice" by the publisher. The trial court further held that the record showed no evidence from which a reasonable jury could find actual malice by clear and convincing evidence. On appeal Friedgood challenges the trial court's determination of her status as a "limited public figure" and holding as to the lack of proof of actual malice.

## FACTUAL BACKGROUND

The underlying facts of this case are undisputed[1] and reflect a family tragedy culminating in a mother's death at the hands of the father by poisoning, the father's subsequent efforts to avoid detection, and his attempts to

---

1. In setting forth the facts in this opinion, we have placed substantial reliance on the rendition of facts as presented by appellant.

misuse his emotionally vulnerable children in those efforts. Dr. Charles Friedgood and his wife Sophie lived in Kensington, Long Island. They had had six children who, by June of 1975, were grown and not living at home. Dr. Friedgood had a lucrative medical practice but had run afoul of the tax laws and the abortion laws. He also had a mistress who had given birth to his two out-of-wedlock children. Esther and her husband had just graduated from law school and were planning to visit Esther's parents the same day Dr. Friedgood was later determined to have killed his wife by injection with Demerol.

Dr. Friedgood signed his wife's death certificate stating the cause of death was stroke. Mrs. Friedgood had had a stroke years earlier, but had almost entirely recovered from it. The assistant district attorney was suspicious of the fact a husband had signed the death certificate of his wife. The family was already in Hazelton, Pennsylvania, Mrs. Friedgood's hometown and prospective burial place, when the burial was stopped by court order and an autopsy performed because of the police suspicion. The autopsy revealed no evidence of stroke, and tissue and organ samples were taken before burial proceeded. When the family returned to Kensington they found a police detective waiting who asked the maid, Lydia, to go with him to the police station for questioning. Esther volunteered to go with her. At the station, the assistant district attorney questioned Esther about Dr. Friedgood's private iife. She told him about her father's mistress and the two out-of-wedlock children and also disclosed her father's financial problems and tax evasion conviction.

After toxicologists determined that Mrs. Friedgood died of a massive overdose of Demerol, the district attorney

obtained a search warrant for Demerol bottles and a hypodermic syringe at the Friedgood home. He and several detectives went to the home with the warrant. Esther answered the door and went to get her husband and Dr. Friedgood. The detectives then showed the warrant and began the search while the family members waited on the porch with friends who were making a condolence call. Dr. Friedgood, standing in the living room doorway, unsuccessfully attempted to speak to Esther in Yiddish. Finally he told her cryptically in English that bottles and syringe were in an upstairs file cabinet. Esther told her sister Beth that their father wanted Beth to get these items, but Beth refused. Esther then went upstairs by a back stairway and took the items from the top drawer of the file cabinet in her father's den, secreting them in her clothing. She went downstairs, then back up to her sister Toba's room and showed her the items. Esther later testified that it was then that Toba told her that the police were looking for Demerol. Esther put the items in a bag and later showed them to her husband, who noticed the word Demerol on the bottle.

After the police left, Esther's husband called Dr. Friedgood's attorney, John Palmer. Esther, Richard and Toba met with Palmer later in the day, but Palmer said he had a conflict of interest and could not advise them. When the trio returned to the house Esther washed all fingerprints from the items, put them back in the bag and put the bag in a coat pocket in a closet. On her father's inquiry she told him where they were. Some days later, when Esther checked the coat pocket, the items were gone. Three days after the police search of the Friedgood home, Dr. Friedgood called home from Kennedy Airport to say he was leaving his car there

and was going away for a few days' rest. His daughter Dvorah's husband called the assistant district attorney, and Dr. Friedgood was removed by police from a London-bound airplane, already out on the runway.[2] He was carrying a large bag. Esther seized the bag after Friedgood was returned to the house by his attorney. In it she found substantial and valuable personal property of her mother, which she dispersed to various hiding places. Later she returned them to the bag and turned it over to her father-in-law, who had an attorney inventory the items.

Two weeks later, Esther's sister Toba, after revealing to maternal relatives the information about Esther's concealment of the bottles and syringe, went to the police with the same information. The police then went to the house and told Esther they thought she was guilty of obstruction of justice by her actions. She called a lawyer with the firm for which her husband was clerking, and accompanied the police to the station at their request. Her husband's law firm asked Jonathan Rosner, a criminal attorney, to represent her and he went to the station house. According to Rosner, the assistant district attorney told him Esther had been arrested for being an accessory after the fact in her mother's killing. Rosner was concerned about the impact of the charges on her legal career as well as on her and her husband personally. Ultimately, Rosner reached an understanding with the assistant district attorney: If Esther voluntarily gave a truthful statement, there would be no arrest record, and she would be free to go. Esther gave the statement. The assistant district attorney stated for the

---

2. It was learned that Dr. Friedgood had been en route to Denmark for a rendezvous with his mistress.

record that the chief assistant district attorney had authorized him to say she would not be prosecuted; Rosner elaborated, for the record, on the understanding reached, to indicate there was to be no formal record of her being arrested by the officers.

Subsequently Esther, her husband and her sisters testified before the grand jury. Dr. Friedgood was indicted and eventually tried. Esther testified against him, but only after resisting extradition from Florida on the ground she feared injury to the baby she was carrying. Dr. Friedgood's trial was highly publicized. Media articles told of Esther's hiding the hypodermic and Demerol bottle during the police search of the house, her discovery of her mother's property in her father's bag at the time of his aborted flight attempt, Toba's telling the assistant district attorney about Esther's concealment of the evidence, and other matters. Dr. Friedgood told a newspaper reporter his children had set him up for the conviction so they could inherit their mother's estate; that Esther was "misinformed" about the finding of the bottles and syringe, and that he was trying to secrete his wife's valuables on Esther's advice, in order to keep the IRS from getting them. Dr. Friedgood was convicted of second degree murder and second degree grand larceny and sentenced to 25 years to life in prison.

In 1980, Leonard Levitt, a news reporter who had covered the story extensively, published a book about Dr. Friedgood's career and the murder of his wife. Its thrust was to use the Friedgood case to suggest that members of the medical profession covered up for each other—even for a chronic malpractitioner. Anita Shreve, a free lance writer, was asked by the editor of Us magazine to write a review of this book. Ms. Shreve read

the book, interviewed the author, and submitted her review to the editor. Kaplan assigned a researcher, Vicki Jo Radovsky, to check the facts. Radovsky wrote the captions under the photographs obtained by Us to accompany the review and submitted the package to Kaplan for approval. The review together with pictures and captions appeared in the April 14, 1981, issue of Us. The pictures were obtained from the publisher of the newspaper, *Newsday*, in which Levitt's original news articles on the case had appeared. The same photos appeared on the dust jacket of Levitt's book.

## THE DEFAMATION ACTION

Esther alleged that comments about her in the Us article were false and defamatory. Specifically, she cites a photograph of her with a caption that stated: "The accomplice: Esther Friedgood hid evidence of the crime in an upstairs file cabinet at her father's request." Esther also claimed the following passage in the review was defamatory:

> When the police arrived with a search warrant, Friedgood confided in his daughter Esther, and convinced her to hide the evidence, thus involving her in the murder. Later she, in turn, confided in another sister, and they went to the police.

Esther claims that she is a private person who did nothing to invite public attention sufficient to be classified as a public figure under the defamation law. She also claims that even if she is considered to be a public figure there is sufficient evidence of actual malice in the record to require this issue to be submitted to a jury.

## THE DEFAMATION LAW

Because free speech is part of the foundation of our society and incorporated in the federal constitution, the traditional law of defamation has been reshaped to avoid intrusion upon free speech rights. One result has been the development of a policy that permits a greater latitude in speech the more public the person or event that is the subject of the speech. Under that policy a public figure, such as a candidate for public office, would have to prove not only that he was defamed but that the publisher of the defamation acted with actual malice toward him. On the other hand, a private person need only prove that she was defamed and that the publisher acted negligently in publishing the defamation. In *Della-Donna v. Gore* we held that a lawyer-trustee of a trust that benefitted a local university was a limited public figure with reference to alleged defamatory statements made during a legal dispute with other trustees over local control and funding of the university. In *Della-Donna* this court also restated some of the basic principles of defamation law that are pertinent to the issues raised here:

1. The proof required in a defamation case depends upon (1) whether the alleged defamation arose out of a matter of public concern or out of a matter of private concern, and (2) whether the plaintiff is a public official, public figure or limited public figure, or is a private person.

2. To determine whether a person is a public figure with reference to the published statements, there is a three part test that requires affirmative responses to each of the following: (1) whether there is a public controversy; (2) whether the plaintiff played a sufficiently

central role in that controversy; and (3) whether the alleged defamation was germane to plaintiff's involvement in that controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974). Under this test it may be possible for someone to become a public figure through no purposeful action of their own.

3. If it is determined that the plaintiff is a public figure, it must be shown that the published statements were not only false and defamatory but were published with actual malice by the publisher.

## PUBLIC FIGURE STATUS

Both sides have cited cases finding or rejecting public figure status for plaintiffs in a variety of factual settings, most of which we find dissimilar to the facts presented here.[3] We also reject the publisher's claims that Esther's status as a lawyer or as a one-time candidate for a local public office controls the outcome here. Rather, we believe the central issue is whether Esther's role in her father's criminal case was sufficient to make her a public figure for purposes of the defamation law and whether that status continued even after the criminal prosecution was terminated.

In *Street v. National Broadcasting Company*, 645 F.2d 1227 (6th Cir. 1981) the plaintiff was the alleged white rape victim in the widely publicized Scottsboro Nine case where nine Southern black youths were accused of rape in 1931. In the course of that litigation the plaintiff was

3. *See, e.g.*, Wolston v. Reader's Digest Association, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); and Shiver v. Appalachee Publishing Company, 425 So.2d 1173 (Fla. 1st DCA 1983).

the focus of numerous press interviews and her version of the case was widely disseminated outside of actual courtroom testimony. After the litigation she disappeared from public view. A defamation suit was brought more than 40 years later after NBC televised a dramatization of one chapter of the book *Scottsboro: A Tragedy of the American South* by an historian, Dr. Daniel Carter. The book was based on the trial court's findings at the 1933 trial of one of the defendants, the transcript of the trial, contemporaneous newspaper reports of the trial and interviews with the trial judge and others. The book suggests that Street's testimony was false. The plaintiff claimed she was a private figure and that even if she had been a public figure at the time of trial, she had long since resumed her role as a private figure. The court rejected both claims.

In evaluating Street's status under the three-part test of *Gertz*, the 6th Circuit observed that not all judicial proceedings involve public controversies. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) (divorce litigation between private parties not public controversy). However, several factors led the court to conclude that the Scottsboro criminal trials involved the kind of public controversy referred to in *Gertz*:

> They [the Scottsboro trials] were the focus of major public debate over the ability of our courts to render even-handed justice. It generated widespread press and attracted public attention for several years. It was also a contributing factor in changing public attitudes about the right of black citizens to equal treatment under law and in changing constitutional principles governing the right to counsel and the exclusion of blacks from the jury.

*Street*, at 1235. The court then considered the nature and extent of plaintiff's participation by noting that she played a prominent role in the case and the attendant public controversy. She was the only alleged victim and she was the state's major witness in the prosecution of the nine black youths. The evidence also indicated that plaintiff recognized her importance to the criminal trials and was aware of the public's interest in her as a personality. The press secured numerous interviews from her and she was able to broadcast her view of the events. The issue of whether Street voluntarily thrust herself into the controversy was seen by the court as the most troublesome. If she had falsely accused the defendants, her participation in the controversy would be voluntary. However, if indeed plaintiff had been raped, her participation in the trial would be involuntary for the purpose of determining her public figure status. The court concluded that legal standards in libel cases need not be drawn so that either the courts or the press must first determine the issue of truth before they can determine whether an individual should be treated as a public or a private figure. In the event that the issues of truth and voluntariness are the same and are in dispute, the court concluded that the public figure status may be determined without regard to whether the individual had initially thrust herself into the case. In such a case, the other factors, prominence and access to media, alone may be examined to determine public figure status. In *Street*, the court concluded that there was evidence of active participation in the controversy not bound up with the issue of truth. That participation was evidenced by Plaintiff's granting of press interviews and promoting her version of the case outside of the courtroom. The court concluded that Street had become a public figure:

> In the context of a widely-reported, intense public controversy concerning the fairness of our criminal justice system, plaintiff was a public figure under *Gertz* because she played a major role, had effective access to the media and encouraged public interest in herself.

*Id.* at 1235.

DURABILITY OF PUBLIC FIGURE STATUS

The plaintiff in *Street* also argued, as does the appellant here, that even if she was a public figure at the time of the 1930's trial, she lost her public figure status over the intervening forty years. The 6th Circuit held:

> We reject this argument and hold that once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy*.

(Emphasis supplied.) *Street,* at 1235, citing *Brewer v. Memphis Publishing Co.,* 626 F.2d 1238 (5th Cir. 1980) (plaintiff sued when a newspaper implied that she was reviving a long-dormant relationship with Elvis Presley); *Meerporl v. Nizer,* 560 F.2d 1061, 1066 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978) (sons of Julius and Ethel Rosenberg are public figures for purposes of subsequent commentary on Rosenberg trials since they spent their earlier years in the limelight). The *Street* court's rationale on this issue is well reasoned:

> Our analytical view of the matter is based on the fact that the Supreme Court developed the pub-

> lic figure doctrine in order that the press might have sufficient breathing room to compose the first rough draft of history. It is no less important to allow the historian the same leeway when he writes the second or the third draft. . . . A contrary rule would tend to restrain efforts to shed new light on historical events and reconsideration of past errors.

*Street*, at 1236.

## THE FRIEDGOOD CASE

In applying the above analysis to the present case, we believe important parallels can be drawn. As a starting point we note that both involved public criminal trials which the public and the press had a constitutional right to attend and to freely disseminate information gained by attendance. Although it cannot be denied that the Scottsboro trials were far more significant in a political, social, and legal sense than was the murder trial of Dr. Friedgood, the fact remains that both cases were initially highly publicized criminal prosecutions out of which other political and/or legal issues arose.[4] The Friedgood prosecution and its attendant publicity was analogous, albeit on a much smaller scale, to the circumstances surrounding the Scottsboro case. Like the plaintiff in *Street*, Esther Friedgood was the prosecution's star witness. Without her testimony, the state would have

---

4. While the Scottsboro case resulted in wide-scale reforms in the jury system and right to counsel, the record reflects that the Friedgood prosecution resulted in the passage of the "Dr. Friedgood Bill," a prohibition of the practice in New York of physicians being permitted to sign the death certificates of relatives, as well as continued criticism of the medical profession's alleged self protection by a code of silence concerning the misdeeds of its members.

had considerable difficulty in convicting her father for her mother's murder. In addition, the record reflects that both Street and the appellant at bar had ample "access to channels of effective communication and hence . . . a . . . realistic opportunity to counteract false statements." *Street*, at 1234, quoting *Gertz*, 418 U.S. at 344, 94 S.Ct. at 3009. The newspaper clippings in the record reflect numerous instances where appellant had granted interviews, including a long series published in "Sunday Newsday."

Finally and most importantly, it appears to be undisputed in this case, unlike *Street*, that Esther, by her voluntary actions, thrust herself into the criminal investigation and prosecution of her father. She was made aware soon after her mother's death of the police suspicions of her father. Even if she could be deemed to be unaware of the significance of the Demerol and syringe at the actual moment that she removed them from her father's office, the record shows that immediately after finding them she was told by her sister that it was those very items that the police were seeking. Consequently, whether she actually believed at the time that her father was the murderer was irrelevant to the issue that she voluntarily chose to conceal evidence for which she knew the police were searching. Her actions in hiding the items from the police, wiping off the fingerprints, and concealing the items in a place which she then disclosed to her father, can be characterized, at the very least, as conduct destined to inject her deeply into the murder investigation and prosecution. Her subsequent concealment of the contents of the suitcase her father had attempted to remove from the country in his aborted flight to Denmark also reflects her continued participation in

the critical events leading up to her father's trial and conviction. In our view all of these actions justify her designation as a limited public figure for purposes of comment about the Friedgood trial based upon the *Street* analysis which applies the *Gertz* rationale.

We also believe, for the same reasons set out by the court in *Street*, that Esther retained her status as a public figure even after the criminal trial of her father had ended. We have already discussed the facts underlying our conclusion that a public controversy was involved. Unlike *Street*, we do not have a 40-year interval but rather one of a few years. Esther's father remains incarcerated and, the record reflects, still professes his innocence. It would seem reasonable under these circumstances to conclude that public discussion about the case may continue. Accordingly, in our view appellant should be deemed a limited public figure for purposes of the comment about her in the book review. Under this analysis, reports about Esther's conduct during the time of the criminal investigation and trial would be protected and, to sustain a defamation action, Esther would not only have to prove that the reports were false and defamatory but also that they were made with actual malice towards her.

## ACTUAL MALICE

We also believe there is a lack of evidence of actual malice. Actual malice analysis should start with whether the plaintiff can offer prima facie evidence that the publication is false. As this court stated in *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983), a false statement of fact is absolutely necessary if there

is to be recovery in a defamation action. The same opinion points out that allegedly defamatory words must be read in the context of the entire publication. *Id.* at 595, and cases cited there. If the case could not possibly have a defamatory effect the complaint may be dismissed or a directed verdict granted. *Id.*, citing *Wolfson v. Kirk*, 273 So.2d 774, 778 (Fla. 4th DCA 1973). The trial court must evaluate the publications not by extremes, but as the common mind would naturally understand it. *Id.*, citing *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197, 200 (Fla. 2d DCA 1962). "In other words, the statement should be considered in its natural sense without a forced or strained construction." 433 So.2d at 595. Here, the appellant relies almost exclusively on inferences to be drawn from the loose use of words in the review describing her conduct such as "criminal," "accomplice" and "horrible" to establish actual malice.[5] Unlike *Street*, the plaintiff here is not being accused of giving false testimony. Rather, the alleged defamatory material is a characterization of conduct substantially admitted by the plaintiff to have occurred. In our view it is questionable whether these comments are defamatory. In any case, the use of these remarks and the inferences to be drawn therefrom as evidence of actual malice fall well short of the clear and convincing standard mandated by the U.S. Supreme Court.

The comments about appellant were hardly more than a restatement of the news reports of her testimony at trial. Here the cutline under appellant's picture used

---

5. In Hay v. Independent Newspapers, Inc., 450 So.2d 293 (Fla. 2d DCA 1984) the Second District held that the words "criminal" and "crook" were statements of opinion, not facts, and hence not defamatory.

the word "accomplice," which appellant suggests conveys the idea that she was an accomplice in the murder of her mother, rather than an accessory subsequently in concealing evidence against her father. However, the cutline itself went on to refer to appellant's hiding of evidence at her father's request. The main text also makes clear that the characterization of appellant's conduct as "an accomplice," "horrible" and "criminal" all refer to the actions of appellant in concealing, at her father's request, the items for which the police were searching. We agree with the trial court that it would not be possible, based on the undisputed facts in the record before us, to prove by clear and convincing evidence the falsity of the publication, defendant's knowledge of the falsity of what was published, or reckless disregard based on a suspicion of its falsity, both essential predicates to establishing actual malice.

Accordingly, for the reasons set out above we affirm the summary final judgment.

DELL and GUNTHER, JJ., concur.

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA
FOURTH DISTRICT

CASE NO. 4-86-2674

ESTHER FRIEDGOOD,
Appellant,

vs.

PETERS PUBLISHING CO., et al.,
Appellees.

**MOTION FOR REHEARING**

COMES NOW the appellant, ESTHER FRIEDGOOD, by and through counsel and pursuant to Florida Rule of Appellate Procedure 9.330, files this her Motion for Rehearing and would state:

1. On February 24, 1988 this Court filed its opinion affirming the final summary judgment appealed.

2. The opinion filed underscores, emphasizes and highlights what the appellant has all along contended, that this case presents a scenario so divergent of view that it is inconceivable that only *one* factual conclusion can be reached from the subject record. In point of fact, while the majority of events are, as this Court noted, *undisputed*, the underlying and operative events *are disputed* both as to *occurrence* and as to *significance*. The record supports this appellant in this regard. Because it does, and because the appellant believes certain salient occurrences have been lost sight of, it is suggested that

this Court overlooked, failed to consider and/or misapprehended the factual significance of the following:

a. At page 3 of its opinion this Court, in setting out the factual background for the subject lawsuit, states:

> "The autopsy revealed no evidence of stroke, and tissue and organ samples were taken before burial proceeded."

The record before this Court *demonstrates* that the autopsy revealed evidence of scar tissue from a *prior* stroke. The autopsy was *inconclusive* as to any new stroke being the cause of death. It is this "fact" which renders arguable (to a jury) any contention that there was "no evidence of stroke." Suffice it to say at this juncture, as it carries through to each and every point to be made in this motion, that it is the "WHY" of the facts, *not necessarily their existence*, which renders the summary final judgment suspect. This Court's opinion in DAWSON v. SCHEBEN, 351 So. 2d 367 (Fla.App.4th 1977), teaches that even if facts are *not in dispute*, where different *inferences* might be drawn from some of the *undisputed facts*, summary judgment is improper.

b. At page 3 of its opinion this Court states:

> "The family was already in Hazelton, Pennsylvania, Mrs. Friedgood's hometown and prospective burial place, when the burial was stopped by court order and an autopsy performed because of the police suspicion."

The record before this Court reflects there existed no court order which stopped the burial and, *further*, as to the autopsy, it was *consented to* by Dr. Friedgood. While

these matters seem inconsequential to the *totality* of the circumstances, it must again be emphasized that the facts surrounding the incident need to be *jury* determined and resolved. As these two instances alone demonstrate, even the undisputed facts generate varying inferences.

c. At page 9 of the opinion, this Court, in framing the "central issue", inquires:

> ". . . whether Esther's role in her father's criminal case was sufficient to make her a public figure for purposes of the defamation law and whether that status *continued* even *after* the criminal prosecution was terminated."

In seeking to generate support for a *positive* answer to the above phrased inquiry, this Court stated at page 14 of the opinion:

> ". . . Esther Friedgood was the prosecution's *star* witness. . ."
>
> * * *
>
> ". . . Esther, by her *voluntary* actions, thrust herself into the criminal investigation and *prosecution* of her father. . ."

It must be remembered that the "conclusions" this Court forms concerning Esther's *voluntary* participation must be tempered with the *equally* undisputed facts (that):

> (1) Esther's "voluntary" statements came under the premise that "*if* Esther voluntarily gave a truthful statement, there would be no arrest record, and she would be free to go"; and
>
> (2) Esther had to be *extradited from Florida* to New York to testify.

That a *jury* could find from a consideration of all the facts that appellant *did not* "voluntarily" thrust herself into the matter *is clear!* Based upon the evidence in the subject record a jury could find, based upon competent and substantial evidence, that the statements given by Esther were not "voluntary" in that there existed threat of prosecution *and* that because Esther had to be "extradited" from Florida to New York to testify at the trial that she did not "thrust herself" into the investigation and prosecution. It must be understood that because evidence exists upon which to premise varying factual conclusions, the failure to submit the matter to a jury deprived the appellant of her day in court.

Equally as clear is the recognition that a jury could find that appellant was *not* the "star witness", especially under the circumstances where the trial lasted for months and appellant's "forced" participation approximated four (4) hours. That the evidence *can* support a finding *either way* is *pertinent* to this matter because this appeal is from an adverse summary final judgment and appellant is entitled to have this Court view the evidence in a light favorable to her. See: HOLL v. TALCOTT, 191 So. 2d 40 (Fla. 1966). *How* a jury would view this case after hearing all the testimony, including appellant's version of the events, is foreclosed as a consequence of this Court's *resolution* of the disputed facts.

Because a genuine issue of material fact exists regarding the "voluntariness" of appellant's participation, and because the assertion that Esther was the prosecution's "star witness" is more in the nature of a *factual conclusion* (which, at this stage of the proceedings should not be drawn), it is clear the summary final judgment appealed should be reversed.

3. The above leads directly to a discussion of this Court's application (to the facts of this case) of the case of STREET v. NATIONAL BROADCASTING COMPANY, 645 F. 2d 1227 (6th Cir. 1981). In analogizing this case to STREET, appellant suggests this Court misapprehended the following:

a. In STREET the plaintiff to the libel action was the prosecutrix and (hence) the *main witness* in the famous rape trials of the Scottsboro Boys which occurred in Alabama more than forty (40) years prior to the law suit. The National Broadcasting Company televised a play which dramatized the role of the local presiding judge in one of those trials. The movie portrayed the judge as a courageous and tragic figure struggling to bring justice in a tense community gripped by racial prejudice and intent on vengeance against nine blacks accused of raping two white women. In the movie the judge set aside a jury verdict of guilty because he believed that the evidence showed that the prosecutrix—the plaintiff in the civil action—falsely accused the defendants. The play portrayed the plaintiff in the derogatory light that the judge apparently viewed her—as a woman attempting to send nine innocent blacks to the electric chair for a rape they did not commit. In addressing the facts from historical perspective, the appellate court deemed significant that:

> ". . . The case was widely discussed in the *local, national and foreign* press." 645 F. 2d at p. 1229.

The *issues* pertinent to the litigation were equally pertinent to *all* citizens. As the Court emphasized:

> "The United States Supreme Court reversed all convictions on the ground that the defendants were

denied the right to counsel guaranteed by the Sixth Amendment. . .

* * *

"(After re-trial and appeal) the United States Supreme Court again reversed, this time because blacks were systematically excluded from grand and petit juries." 645 F. 2d at p. 1230.

The alleged crime occurred in April of 1931 and it was not until 1937 that the last of the defendants left the judicial system. Hence, it may be stated that in STREET, supra, the case pended before the public for over seven (7) years. As the Court noted:

"During the lengthy course of the Scottsboro trial, newspapers frequently wrote about Victoria Frank. She gave some interviews to the press. Thereafter, she disappeared from public view. The Scottsboro trials and her role in them *continued to be* the subject of *public discussion,* but there is no evidence that Mrs. Street sought publicity. NBC incorrectly stated in the movie that she was no longer living. . ." 645 F. 2d at p. 1230.

On the facts as stated above, and in discussing the question of whether or not the case presented a "public controversy" the Court opined:

"The Scottsboro trials were the focus of *major public debate* over the ability of our courts to render even-handed justice. It generated *widespread press* and attracted *public attention for several years.* It was also a contributing factor in changing public attitudes about the right of black citizens to equal treatment under law and in changing constitutional principles governing the right to counsel and the exclusion of blacks from the jury." 645 F. 2d at p. 1234.

4. Reverting to the instant cause, it may fairly be stated that *at no time* was the appellant *either* the prosecutrix *or* (most importantly of all) a person possessed of any intimate details concerning the *murder* which was the crime *charged!*

Further, *unlike the plaintiff in STREET* "who experienced (firsthand) the crime", appellant had *no knowledge* of the murder. This fact is undisputed! Hence, we run full circle and return to the underlying tragedy of this entire scenario. The allegedly libelous article (written several years after the fact) LED ONE TO BELIEVE (as it was so intended?) that appellant was "an accessory to murder." Further, it was *written* at a time when appellant *had no opportunity* to "broadcast her view of the events." See: STREET, supra, 645 F. 2d at p. 1234. This Court itself acknowledged this fact in expressly *rejecting* appellee's contentions that appellant "retained" public figure status:

> "We also reject the publisher's claims that Esther's status as a lawyer or as a one-time candidate for a local public office controls the outcome here. . ." Slip Opinion at page 9.

At the time of *the trial* no one "implicated" appellant in the murder. The reason was simple. The appellant had nothing whatsoever to do with it. *This fact* is undisputed and should be the cornerstone for any analysis of the issues found herein. Several years later, *when the book review was published*, it was *that review* which, *for the first time*, allegedly libeled the appellant AND THIS OCCURRED AT A PERIOD OF TIME WHEN APPELLANT *DID NOT* HAVE ACCESS TO THE MEDIA. It is this inconsistency which this Court overlooked and/or misapprehended. This fact is important for another reason.

At page 15 of the opinion this Court stated:

> "We also believe, for the same reasons set out by the court in STREET, that Esther *retained her status* as a public figure even *after* the criminal trial of her father had ended. We have already discussed the facts underlying our conclusion that a public controversy was involved. Unlike STREET, we do not have a 40-year interval but rather one of a few years. Esther's father remains incarcerated and, the record reflects, still professes his innocence. It would seem reasonable under these circumstances to conclude that public discussion about the case *may* continue. . ."

At page 13 of its opinion this Court quotes that portion of the STREET opinion which expresses the above "rationale":

> "Our analytical view of the matter is based on the fact that the Supreme Court developed the public figure doctrine in order that the *press* might have sufficient breathing room to compose the first rough draft of history. It is no less important to allow the *historian* the same leeway when he writes the second or the third draft. . . A contrary rule would tend to restrain efforts to shed new light on historical events and *reconsideration* of past errors."

Most obviously, whether or not it would be "reasonable" (under these circumstances) to conclude that public discussion about the case *may* continue is *itself a question of fact* for the trier of fact! What is "reasonable under the circumstances" is, and always has been, traditionally a question of fact for the trier of fact.

Further, the "historian" in this case was *the author of the book, not* the writer of the review! The reviewer was neither "drafting history" nor recording a fact. At least, on appeal from an adverse summary final judgment the appellant is entitled to argue this and, more importantly, should have been allowed to argue this to a jury. The reviewer *implicated* appellant in a manner *in which she was not implicated before.* Whether or not that was an honest attempt to record history or an unwise show of sensationalism remains to be seen. Sight should not be lost of the fact that immediately preceding the passage in the article relating the fact that the appellant's father confided in her and "convinced" her to hide the evidence, the article states: "He not only gave his wife enough traceable Demerol to kill a horse and against medical ethics signed her death certificate, but he then left the murder weapons, the syringe and the Demerol bottle, lying in an upstairs filing cabinet." When a reasonable person reads that sentence, together with the next successive one, the implication was that the appellant knew of her father's action and *intentionally concealed what she was told constituted murder weapons.* This is not a fair assessment of the facts, it is not a true assessment of the facts and it should have remained a question of fact for the trier of fact as to what was the correct version of the events. On the record as it exists at this time, a jury could well find:

(1) The appellant did not know (at the time that she did the acts) that her mother was murdered;

(2) That the appellant did not know the police had a search warrant; and

(3) The appellant did not know of her father's plans.

With all due respect for this Court's analysis, the reasoning utilized exposes clearly the concerns of this appellant that *at no time* (ever) has she had an opportunity to defend herself against the "accusations." More importantly, she has never had an opportunity to defend herself against the "innuendo." This Court will note its own statement:

> "In *our view* all of these actions justify her designation as a limited public figure for purposes of comment about the *Friedgood trial* based upon the STREET analysis which applies the Gertz rationale. . ."

This Court's *statement* followed this Court's *discussion* of the facts *as this Court viewed them!* However, because these "facts" can be construed in numerous ways (and produce varying inferences) jury intervention is necessary. Report *about* the "Dr. Friedgood trial", including *discussion* of what the appellant did, should not provide any legal impediment to the appellant's action against the appellee for what it *ultimately said*. The question of whether it was "reporting history" *or* creating *fiction* should be answered by a jury as the circumstances impact directly upon the issue of actual malice!

While determination of "public figure status" may well present a matter of law for the Court, said matter should apply only *after* resolution by the jury of all disputed factual questions. Since the questions of fact in this case are numerous, it may be concluded that this Court failed to consider the jury's function in matters of this nature.

The appellant requests this Court to grant the subject motion for rehearing and to allow further argument in the cause.

WHEREFORE, the appellant, ESTHER FRIEDGOOD, by and through her counsel, respectfully moves this Honorable Court for the entry of its order granting the subject motion for rehearing, for the entry of an order vacating the opinion filed February 24, 1988 and for the entry of an order reversing the summary final judgment appealed with directions to the trial court to hold a jury trial on all issues.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing was served, by U.S. mail, this 10th day of March, 1988, on opposing counsel:

Thomas R. Julin, Esq.
Donald M. Middlebrooks, Esq.
STEEL, HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
Attorneys for Appellees.

Respectfully submitted,

Horton, Perse & Ginsberg
and
Hoppe & Backmeyer, P.A.
Attorneys for Appellant
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

By: /s/ Arnold R. Ginsberg
Arnold R. Ginsberg

**ORDER DENYING REHEARING**

IN THE
DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT,
P.O. BOX A,
WEST PALM BEACH, FL 33402

CASE NO. 4-86-2674

ESTHER FRIEDGOOD,
Appellant,

v.

PETERS PUBLISHING CO., et al.,
Appellee.

MARCH 28, 1988

BY ORDER OF THE COURT:

ORDERED, appellant's March 10, 1988 Motion for Rehearing is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
Clyde L. Heath,
Clerk.

cc: Arnold R. Ginsberg, Esq.
Thomas R. Julin, Esq.

DHP

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA
FOURTH DISTRICT

CASE NO. 4-86-2674

ESTHER FRIEDGOOD,
Plaintiff/Petitioner,

vs.

PETERS PUBLISHING CO., et al.,
Defendants/Respondents.

**NOTICE TO INVOKE DISCRETIONARY JURISDICTION**

NOTICE IS GIVEN that ESTHER FRIEDGOOD, Plaintiff, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court dated February 24, 1988, rendered March 28, 1988 upon denial of a timely filed motion for rehearing. The decision expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.

Horton, Perse & Ginsberg
and
Hoppe & Backmeyer, P.A.
Attorneys for Petitioner
410 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 358-0427

By: /s/ Arnold R. Ginsberg
Arnold R. Ginsberg

I HEREBY CERTIFY that a true copy of the foregoing Notice to Invoke Discretionary Jurisdiction was served, by U.S. mail, this 20th day of April 1988, on the following counsel of record:

Thomas R. Julin, Esq.
Donald M. Middlebrooks, Esq.
STEEL, HECTOR & DAVIS
Attorneys for Respondents
4000 Southeast Financial Center
Miami, Florida 33131-2398

/s/ Arnold R. Ginsberg
Arnold R. Ginsberg

## ORDER DENYING REVIEW

SUPREME COURT OF FLORIDA
MONDAY, AUGUST 29, 1988

---

CASE NO. 72,385

District Court of Appeal,
Fourth District
No. 4-86-2674

---

ESTHER FRIEDGOOD,
Petitioner,

v.

PETERS PUBLISHING CO., et al.,
Respondents.

---

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

H

cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. Mary E. Lupo, Judge
Arnold R. Ginsberg, Esquire
Thomas R. Julin, Esquire
Donald M. Middlebrooks, Esquire

(SEAL OF COURT)

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-863

# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

ESTHER FRIEDGOOD,
*Petitioner,*

vs.

PETERS PUBLISHING CO., a Division of
Concentric Enterprises, Inc.,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF
FLORIDA, FOURTH DISTRICT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. JULIN
(Counsel of Record)
ALICIA R. ZALESIN
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810
*Attorneys for Respondent*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3020

3488

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the District Court of Appeal of Florida, Fourth District, is a decision from the highest state court from which a decision could be had notwithstanding that the Supreme Court of Florida claimed to have jurisdiction to decide the case on the merits, but declined to accept jurisdiction without stating the basis for its decision?

2. Assuming that the decision of the District Court of Appeal of Florida, Fourth District, is a decision from the highest state court from which a decision could be had, does this Court lack jurisdiction to review the decision because the petition for certiorari is untimely and because the state court's decision rests on an adequate and independent state ground?

3. Assuming that this Court could assert jurisdiction, should this Court review a Florida state court decision affirming summary judgment for the defendant in a libel case on the grounds that the plaintiff (1) admitted the book review sued upon was substantially true, and (2) became a "public figure" in her role as the central witness in a murder prosecution in 1976 and failed to show that she could offer clear and convincing evidence that the defendant acted with actual malice in publishing the 1981 book review?

## PARTIES TO THE PROCEEDING BELOW

The petitioner has correctly set forth a description of the parties below. The following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of the respondent, Peters Publishing Co., as is required by Rule 28.1 of this Court:

Concentric Enterprises, Inc.
MacFadden Holdings, Inc.
MacFadden Acquisition Corp.
Lexington Investments, Inc.

## TABLE OF CONTENTS

Questions Presented for Review ..... I
Parties to the Proceeding Below ..... II
Table of Authorities ..... IV
Basis for Jurisdiction ..... 1
State Constitutional Provision at Issue ..... 1
Summary of Argument ..... 2
Argument ..... 3

I. This Court Lacks Jurisdiction to Review the Fourth District's Decision ..... 3

A. The Fourth District Is Not the Highest Court of Florida From Which a Decision Could Have Been Had ..... 3

B. If the Fourth District Is the "Highest Court," the Petition Was Not Timely and the Decision Is Not Reviewable ..... 8

1. The Petition Was Not Timely ..... 8

2. The Fourth District's Decision Rests on an Adequate and Independent State Ground ..... 14

a. Substantial Truth Is an Independent State Ground for the State Court's Decision ..... 16

b. Substantial Truth Is an Adequate State Ground for the State Court's Decision ..... 18

II No Reasons Exist for Granting the Writ ..... 20

A. The State Court Did Not Decide a Federal Question in a Way in Conflict With

Another State Court of Last Resort or a Federal Court of Appeals ..... 21

B. The State Court Did Not Decide an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court ..... 21

C. The State Court Did Not Decide a Federal Question in a Way in Conflict With Applicable Decisions of This Court ..... 24

Conclusion ..... 25

## TABLE OF AUTHORITIES

**Cases**

*Adjmi v. State*, 154 So.2d 812 (Fla. 1963) ..... 6

*American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923) ..... 4, 5, 9

*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) ..... 24

*Axelrod v. Califano*, 357 So.2d 1048 (Fla. 1st DCA 1978) ..... 9

*Bair v. Palm Beach Newspapers, Inc.*, 2 Fla. Supp.2d 137 (15th Cir. 1982), *aff'd*, 444 So.2d 1131 (Fla. 4th DCA 1984) ..... 19

*Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) ..... 21

*Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593 (Fla. 4th DCA 1983), *pet. for rev. denied*, 443 So.2d 979 (Fla. 1984) ..... 17, 18, 19

*Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612 (2d Cir.), *cert. denied*, 109 S.Ct. 145 (1988) ..... 21

*Davis v. Mandau*, 410 So.2d 915 (Fla. 1981) ..... 11
*Delacruz v. Peninsula State Bank*, 221 So.2d 772 (Fla. 2d DCA 1969) ..... 18
*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) ..... 24
*Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157 (1917) ..... 18
*Florida Star v. B.J.F.*, No. 87-329 (U.S. filed Aug. 26, 1987), *prob. juris. noted*, 57 U.S.L.W. 3258 (U.S. Oct. 11, 1988) ..... 8
*Florida Star v. B.J.F.*, 108 S.Ct. 499 (1987) ..... 10
*Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988) .....10, 11, 12, 13
*Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) ..... 18
*Friedgood v. Peters Publishing Co.*, 521 So.2d 236 (Fla. 4th DCA), *pet. for rev. denied*, 531 So.2d 1353 (Fla. 1988) .....*passim*
*Hallmark Builders, Inc. v. Gaylord Broadcasting Co.*, 733 F.2d 1461 (11th Cir. 1984) ..... 19
*Hawke v. Broward Nat'l Bank*, 220 So.2d 678 (Fla. 4th DCA 1969) ..... 18
*Herb v. Pitcairn*, 324 U.S. 117 (1945) .....14, 15, 20
*Hetrick v. Village of Lindsey*, 265 U.S. 384 (1924) ..... 5
*Hicks v. Miranda*, 422 U.S. 332 (1975) ..... 7
*Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970) ..... 19
*Matthews v. Huwe*, 269 U.S. 262 (1925) ..... 5
*McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962) .....17, 18, 19
*Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) ..... 21
*Michigan v. Long*, 463 U.S. 1032 (1983) .....14, 15, 17, 20

*Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) ..... 5

*Midland Ins. Co. v. Friedgood*, 577 F. Supp. 1407 (S.D. N.Y. 1984) ..... 23

*Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ..... 24

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ..17, 25

*Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U.S. 264 (1912) ..... 14

*Nowick v. Mazda Motors of America, Inc.*, 523 So.2d 769 (Fla. 1st DCA 1988) ..... 9

*People v. Friedgood*, 58 N.Y.2d 467, 462 N.Y.S.2d 406 (1983) ..... 23

*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986) .....16, 17

*R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 499 (1986) ..... 5, 7

*Reaves v. State*, 485 So.2d 829 (Fla. 1986) ..... 11

*Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981) .....21, 22, 24

*Tumey v. Ohio*, 273 U.S. 510 (1927) ..... 5

*Tyus v. Apalachicola Northern R.R. Co.*, 130 So.2d 580 (Fla. 1961) ..... 6

*Valentine v. CBS Inc.*, 698 F.2d 430 (11th Cir. 1983) .... 19

*Wolfson v. Kirk*, 273 So.2d 774 (Fla. 4th DCA), *pet. for rev. denied*, 279 So.2d 32 (Fla. 1973) ..... 17

*Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979) .....21, 22, 25

*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) ..... 14

**Constitutional Provisions, Statutes, and Rules**

U.S. Const. amend. I ..... 16
Fla. Const. art. V, §3(b)(3) ..... *passim*
Fla. Const. art. V, §3(b)(5) ..... 7
28 U.S.C. §1257 ..... 3, 9
28 U.S.C. §1257(3) ..... 1, 2, 7
28 U.S.C. §2101(c) ..... 1, 9
Rule 17.1, Rules of the Supreme Court of the United States (1988) ..... 20
Rule 20.2, Rules of the Supreme Court of the United States (1988) ..... 1

**Other Authorities**

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) ..... 14
England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147 (1980) ..... 8-9
A. England & T. Simon, *Florida Appellate Practice Manual*, §2.22(a) (rev. 1988) ..... 11
Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. Fla. L. Rev. 80 (1983) ..... 8
Overton, *A Prescription for the Appellate Caseload Explosion*, 12 Fla. St. U. L. Rev. 205 (1984) ..... 7

## BASIS FOR JURISDICTION

The plaintiff/petitioner seeks to invoke this Court's jurisdiction to review a decision of the District Court of Appeal of Florida, Fourth District, pursuant to 28 U.S.C. §1257(3) under the time schedule as authorized in 28 U.S.C. §2101(c) and Rule 20.2, Rules of the Supreme Court of the United States (1988).

This Court lacks jurisdiction because the decision of the Fourth District is not a decision of the highest court of the state from which a decision could be had. Alternatively, if the decision of the Fourth District is a decision of the highest court, this Court lacks jurisdiction to review that decision because the petition was not filed within 90 days of rendition of the decision as required by 28 U.S.C. §2101(c), and because the decision rests on an adequate and independent state ground.

These two jurisdictional points are discussed in the first point of the argument below.

## STATE CONSTITUTIONAL PROVISION AT ISSUE

Article V, section 3(b)(3), Florida Constitution (1980):

The supreme court:

* * *

May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

## SUMMARY OF ARGUMENT

*Point I*: *Lack of Jurisdiction* Pursuant to 28 U.S.C. §1257(3), this Court may review only those decisions from the highest state court from which a decision could be had. The decision of the Fourth District is not such a decision because the Florida supreme court's decision declining to review the Fourth District's decision amounts to a decision on the merits under Florida law.

Alternatively, if the Fourth District's decision is treated as a decision of the "highest court" in Florida, the petition is untimely because it was not filed within 90 days of rendition of that decision. The plaintiff could not have had a decision from the Florida supreme court because that court did not have jurisdiction to review the Fourth District's decision. Therefore, the plaintiff's effort to obtain review from the Florida supreme court did not extend the time for seeking review in this Court.

In addition, the Fourth District's decision cites and relies on Florida common law cases establishing that libel actions may not be based on substantially true publications. The Fourth District found the book review at issue in this case substantially true and, thus, the decision rests on an independent and adequate state ground.

*Point II*: *Absence of Reasons for Granting the Writ.* Assuming arguendo that this Court has jurisdiction to review the decision below, it should decline to exercise it. The plaintiff's principal basis for seeking review is that the court below afforded the defendant publisher of a book review the same constitutional protection against libel actions as that afforded other journalists and historians. This was not even an arguable error

by the state court—let alone a reason that this Court should review a state court decision which does not conflict with other state or federal decisions, which does not decide any important, unsettled federal question, and which does not conflict with applicable decisions of this Court.

## ARGUMENT

### I.

### This Court Lacks Jurisdiction to Review the Fourth District's Decision

Two jurisdictional arguments must be considered in this case. The first focuses on whether the petition for certiorari was addressed to the appropriate state court. The second, alternative argument shows that even if the petition was correctly addressed to the intermediate appellate court, it is both untimely and directed to a state court decision which rests on adequate and independent state law grounds.

#### A. The Fourth District Is Not the Highest Court of Florida From Which a Decision Could Have Been Had

The only state court decisions reviewable by this Court are decisions of the highest court in the state from which a decision could be had. 28 U.S.C. §1257. The Florida supreme court was the highest court from which a decision could have been had and was had in this case because its decision declining jurisdiction over the case must be read as a decision on the merits.

The petition for certiorari reflects that the Fourth District denied rehearing and rendered the decision which the plaintiff seeks to have reviewed on March 28, 1988. (Petitioner's Brief A44). The petition also reflects that the plaintiff sought review of the Fourth District's decision by the Florida supreme court (Petitioner's Brief A45), and that the Florida supreme court declined to accept jurisdiction on August 29, 1988. (Petitioner's Brief A47-48). The petition for writ of certiorari to the Fourth District was filed within 90 days of the Supreme Court of Florida's decision, but 237 days after rendition of the Fourth District's decision.

The preliminary jurisdictional issue raised by this scenario is whether the plaintiff was limited to seeking review of the Florida supreme court's decision rather than the Fourth District's decision. Analysis of this issue must begin with *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923). In that case, a Louisiana court of appeal affirmed a judgment against the defendant. The defendant applied to the supreme court of the state for a writ of certiorari, but the writ was " 'refused for the reason that the judgment is correct.' " *Id.* at 20 (citation omitted in original). The defendant then sought a writ of certiorari from this Court to the Louisiana court of appeal. The plaintiff asserted that the writ of certiorari was erroneously addressed to the court of appeal rather than to the Louisiana supreme court. This Court rejected the argument, holding that the Louisiana supreme court had discretion to review the lower court's decision and that "when the jurisdiction was declined, the court of appeal was shown to be the highest court of the state in which a decision could be had." *Id.* at 20-21. This Court further held that "the limit of time

for applying to this court was from the date when the writ of certiorari was refused [by the state supreme court]." *Id.* at 21; *see also Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

This Court also has held, however, that if the higher court's order is a decision on the merits, that order becomes the reviewable judgment. *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 499, 506 (1986). Where the higher court summarily dismisses an appeal, and the dismissal could be interpreted as either a decision on the merits or a dismissal for lack of jurisdiction, this Court will consider the dismissal to be a disposition on the merits in "the absence of positive assurance to the contrary." *Id.; see also Tumey v. Ohio*, 273 U.S. 510 (1927); *Matthews v. Huwe*, 269 U.S. 262 (1925); *Hetrick v. Village of Lindsey*, 265 U.S. 384 (1924).

These cases apparently leave the rule established in *Levee* undisturbed.[1] Thus, if the petitioner has no right of review, but may only seek the higher state court's exercise of discretionary jurisdiction, then, under *Levee*, the intermediate court's decision is the only decision reviewable in this Court in the event that the higher state court declines to exercise its discretion. If, however, the petitioner seeks to invoke the *mandatory* appellate jurisdiction of the higher state court—or, in other words, makes a claim to higher appellate review as of right—and that court dismisses the case without com-

---

1. *Levee* should be overruled. For purposes of this Court's jurisdiction, there is no reason to treat summary dismissals of appeals any differently from denials of discretionary review. Both decisions of the highest state appellate court afford the appellant or petitioner the same type of review.

ment on whether the decision is jurisdictional or on the merits, then the higher court's decision is the only decision which is reviewable by this Court.

In the instant case, the plaintiff sought the Florida supreme court's review of the Fourth District's decision, alleging that the Florida supreme court had jurisdiction to review the case under article V, section 3(b)(3) of the Florida Constitution. That provision states that the Florida supreme court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Although this section of the Florida Constitution is permissive on its face, the Florida supreme court has interpreted the predecessors to this section—which also were worded permissively—as providing a right of review in every case where conflict jurisdiction is found to exist. For example, in *Tyus v. Apalachicola Northern Railroad Co.*, 130 So.2d 580 (Fla. 1961), the supreme court held:

> Since we have concluded that, on the face of the subject opinion of the District Court, it appears there can be no doubt about the question of direct conflict with many of our prior decisions, as well as the decision of the District Court of Appeal, Third District, . . . it becomes our duty and responsibility to consider the case on its merits and decide the points passed upon by the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this court on appeal.

*Id.* at 585 (footnotes omitted); *see also Adjmi v. State*, 154 So.2d 812, 817 (Fla. 1963) (holding that once the

jurisdictional issue is settled "we not only have the right but we are charged with the duty of considering this case on its merits as though it had come here originally on appeal") (footnote omitted). Thus, although the Florida supreme court refers to its jurisdiction over conflicting decisions as "discretionary," the jurisdiction is required to be exercised whenever a conflict sufficient to meet the jurisdictional hurdle has been found to exist. The court may decline to exercise jurisdiction only when it finds no such conflict.[2]

Under these circumstances, the Florida supreme court's non-explanatory decision declining to review the Fourth District decision in this case[3] is just as much a decision "on the merits" as were the summary dismissals in such cases as *R.J. Reynolds* and as have been this Court's summary dismissals. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Because the Florida supreme court's decision was "on the merits," the decision of the Fourth District was not the decision of the highest court in Florida from which a decision could be had and therefore, in accordance with 28 U.S.C. §1257(3), the petition for a writ of certiorari to the Fourth District must be dismissed.

---

2. The Florida supreme court also has "discretionary" jurisdiction, under article V, section 3(b)(5), to review decisions which address certain issues certified by the intermediate appellate courts. Studying the disposition of such certifications for a full year, a justice of the Florida supreme court observed: "In fact, all questions certified by the district courts were accepted." Overton, *A Prescription for the Appellate Caseload Explosion*, 12 Fla. St. U. L. Rev. 205, 227 (1984).

3. The Florida supreme court's decision states only that the court has "determined that it should decline to accept jurisdiction." (Petitioner's Brief A47). The court did not explain that it was doing so because it lacked jurisdiction to review the case or because it found the petition to be without merit.

### B. If the Fourth District Is the "Highest Court," the Petition Was Not Timely and the Decision Is Not Reviewable

If this Court concludes that the Fourth District was the highest court in Florida from which a decision could be had, then a second jurisdictional argument must be considered. The argument advances two independent grounds for dismissal. The first is that the petition for certiorari was not timely. The second is that the Fourth District's decision rests on an adequate and independent state ground.

#### 1. The Petition Was Not Timely

The petition for certiorari in this case was filed in this Court more than 90 days after rendition of the Fourth District's decision, but less than 90 days from the Florida supreme court's decision declining to review the decision. This creates a timeliness issue nearly identical to the issue recently raised—but not yet resolved—in *Florida Star v. B.J.F.*, No. 87-329 (U.S. filed Aug. 26, 1987), *prob. juris. noted*, 57 U.S.L.W. 3258 (U.S. Oct. 11, 1988).

The Florida supreme court is a court of limited jurisdiction. Only several narrow classes of cases may qualify for review by the Florida supreme court. Article V, section 3, Florida Constitution. All other cases are final once they have been disposed of by the district courts of appeal. *See generally* Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. Fla. L. Rev. 80 (1983); England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147

(1980). In those cases where the Florida supreme court cannot exercise jurisdiction, the district court of appeal is the highest court in the state from which a decision could be had. 28 U.S.C. §1257. Therefore, the time for seeking review of a district court of appeal decision in this Court under 28 U.S.C. §2101(c) commences on the date that the district court of appeal renders its decision. In those cases where the Florida supreme court can exercise jurisdiction, the time for seeking review in this Court commences on the date that the Florida supreme court renders its decision denying review (and hence revealing the district court as the highest court from which a decision could be had) or from its own decision on the merits. *See Levee*, 263 U.S. at 20-21 (1923).

The Florida supreme court had no jurisdiction to review the decision of the Fourth District at issue in this case. The sole basis for jurisdiction which the plaintiff alleged existed in the Florida supreme court was that the decision expressly and directly conflicts with a decision of another district court of appeal or of the Florida supreme court on the same issue of law. (Petitioner's Brief A45). As noted above, article V, section 3(b)(3) of the Florida Constitution does provide the Florida supreme court with jurisdiction to review such decisions. Yet, even a cursory review of the Fourth District decision reveals that the alleged conflict does not exist.[4]

---

4. The plaintiff claimed below that the Fourth District's decision was in "direct and irreconcilable" conflict with summary judgment standards set forth in two decisions of other Florida district courts of appeal: *Axelrod v. Califano*, 357 So.2d 1048 (Fla. 1st DCA 1978), and *Nowick v. Mazda Motors of America, Inc.*, 523 So.2d 769 (Fla. 1st DCA 1988). The Fourth District in fact faithfully applied the standard as it is defined in those cases.

Whether such conflict in fact exists obviously is a question of state law which can be addressed by the Florida courts. When faced with a nearly identical question in *Florida Star* (the appeal was docketed more than 90 days from the intermediate appellate court decision sought to be reviewed, but less than 90 days from the Florida supreme court's refusal to review the decision), this Court stated:

> Because this appeal involves a question of law of the State of Florida which is determinative of this cause and for which there is no controlling precedent of the Supreme Court of Florida, this Court, pursuant to Article V, Section 3(b)(6) of the Florida Constitution, certifies to the Supreme Court of Florida and respectfully requests that Court to answer, the following question: Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear Appellant's appeal in this cause from the Florida First District Court of Appeal?

*Florida Star v. B.J.F.*, 108 S.Ct. 499, 499 (1987) (order certifying question to Florida supreme court).

In response, the Florida supreme court rendered *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988), which answers the question not only for the case before it, but for all cases which may subsequently arise, including the instant case. The decision purports to bisect the text of article V, section 3(b)(3) of the Florida Constitution into both a "general grant of discretionary subject-matter jurisdiction" and "a constitutional command as to how the discretion itself may be exercised." 530 So.2d at 288. Having accomplished this metaphysical division of section

3(b)(3), the court then concluded that "it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." 530 So.2d at 288. The decision is surprising because it appears to be inconsistent with the language of the constitution itself—as well as numerous previous decisions of the Florida supreme court which are neither cited in this decision nor overruled—which requires an actual, expressed conflict of opinions, rather than a hypothetical possibility of conflict. *See* Fla. Const. art. V, §3(b)(3); *see also Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986); *Davis v. Mandau*, 410 So.2d 915 (Fla. 1981). Until the *Florida Star* decision, it was well-settled that the conflict "must be found within the confines of the majority opinion" in order for jurisdiction to exist. A. England & T. Simon, 1 *Florida Appellate Practice Manual* §2.22(a) (rev. 1988).

The decision's radical departure from the text of the Florida Constitution and precedent is candidly explained by the Florida supreme court as necessitated by its concern regarding the impact which its decision might have on litigants seeking review in the United States Supreme Court. The court wrote:

> We confess that we are much influenced in this holding by the procedural quagmire that would result from a negative answer [to the jurisdictional question]. . . . If, after the fact we held in a case such as this that there was no jurisdiction, litigants would be placed in a needlessly burdensome position. A party would have to try to predict which court ultimately would recognize jurisdiction in the case and file a

> petition for review accordingly. A party who files only in the United States Supreme Court, however, would risk the objection that he or she has not exhausted state court remedies. On the other hand, a party who files only in the Florida Supreme Court and is denied review, would risk the objection made by B.J.F. here that the later appeal to the United States Supreme Court is untimely.

530 So.2d at 289.

In assisting litigants, however, the Florida supreme court did not wish to go so far as to actually expand the category of cases which would be reviewable by it. It wanted to ensure that its broad interpretation of its "jurisdiction" would not result in a flood of new petitions for review. To accomplish this feat, the court returned to the "constitutional command" in article V, section 3(b)(3)—parsed earlier from jurisdictional considerations—which governs how its discretion may be exercised. According to the court, it has adhered to this part of article V, section 3(b)(3), "in refusing to exercise [its] discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court." 530 So.2d at 289.

Thus, the court came to the absurd conclusion that although it has discretionary jurisdiction to review any case containing a hypothetical conflict, it is constitutionally forbidden from exercising that discretion.

The Florida supreme court's decision is a transparent attempt to manipulate this Court's jurisdiction by creating a farcical procedure in the Florida courts. A party must now seek review of a Florida district court of appeal decision in the Florida supreme court whenever such a de-

cision consists of an opinion which "hypothetically could create conflict," *id.* at 288, yet, there is no possibility that the Florida supreme court will review the decision because such exercise of its discretionary jurisdiction is proscribed by the constitution.

The reality which continues to exist in the Florida courts after *Florida Star* is that, where the decision contains no actual, express and direct conflict with a decision from another district court of appeal or from the Florida supreme court, the highest court from which a decision can be had is the district court of appeal.

The reality in this case is that the Fourth District was the highest court in Florida from which the plaintiff could have obtained a decision and therefore, the time for seeking review in this Court commenced from the date on which the Fourth District rendered its decision, rather than the date on which the Florida supreme court declined to review the case. Significantly, the plaintiff in this case has not been prejudiced by any confusion which the Florida supreme court's *Florida Star* decision may have engendered. As noted, the Fourth District rendered its decision on March 28, 1988. The Florida supreme court did not render the *Florida Star* decision until September 1, 1988—long after the time for seeking review by this Court of the Fourth District's decision in this case had expired. It should have been apparent to the plaintiff that the Florida supreme court would have had no jurisdiction to review the Fourth District's decision and she should have filed her petition for certiorari within 90 days of the date the Fourth District rendered its decision.

The one remaining point is how this Court can assure itself that the Florida supreme court did not in fact

have jurisdiction to review the Fourth District's decision. As noted, this is a matter of state law. But also as noted above, the Florida supreme court has held that it not only has the right, but the duty to review every decision which it finds to be within its discretionary jurisdiction. It is appropriate therefore for this Court to assume that whenever the Florida supreme court declines to accept jurisdiction, it is doing so because it is without jurisdiction to review the case. *See Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U.S. 264, 269 (1912).

### 2. The Fourth District's Decision Rests on an Adequate and Independent State Ground

When a state court decision rests on an adequate and independent state ground, the Supreme Court is without jurisdiction to review the case. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1037 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977) (noting that such judgments "not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. [The Court is] utterly without jurisdiction to review such state decisions"). The rationale for this limitation "is found in the partitioning of power between the state and Federal judicial systems and in the limitations of [the Court's] own jurisdiction." *Pitcairn*, 324 U.S. at 125. As this Court has explained:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge

> federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

*Id.* at 125-26. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of th[e] Court's refusal to decide cases where there is an adequate and independent state ground." *Long*, 463 U.S. at 1040.

In the instant case, the Fourth District Court of Appeal set out in a "plain statement,"[5] the adequate and independent state ground on which its decision rested. Setting forth the well-established principle of Florida common law that a plaintiff can recover in a libel action only if he can prove that the statements complained of are false—and citing three of the leading cases supporting that proposition—the court found that "the alleged defamatory material is a characterization of conduct substantially admitted by the plaintiff to have occurred." *Friedgood v. Peters Publishing Co.*, 521 So.2d 236, 242 (Fla. 4th DCA), *pet. for rev. denied*, 531 So.2d 1353 (Fla. 1988). The court thus concluded that, as the defendant had argued,[6] the statements complained of were

---

5. *Long*, 463 U.S. at 1040-44. In *Long*, the Court articulated the requirement of a "plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 1044.

6. It is significant to note that, throughout the proceedings in this case, the defendant has argued that the Florida common law precludes the maintenance of this libel action because the undisputed material facts establish that the publication is not substantially false.

not substantially false and that therefore, as a matter of Florida common law, an action for libel could not be maintained by the plaintiff.

Because the Fourth District rested its decision on a state ground that is adequate to support the judgment and that is independent of any federal grounds for decision, this Court must decline to exercise its jurisdiction to review the state court's decision. Review would result only in the rendering of an advisory opinion and would intrude on the independent operation of the state courts.

### a. Substantial Truth Is an Independent State Ground for the State Court's Decision

The Fourth District's express conclusion that the allegedly defamatory statements were substantially true, although reached in the context of analyzing the federal actual malice issue, provides a plain Florida common law ground for the decision. The conclusion was not compelled by any federal law or interpretations thereof. Rather, the Fourth District rested its conclusion solely on Florida common law cases that themselves had relied on the well-established principle of the state's common law that libel actions may not be grounded on substantially truthful publications.[7]

---

7. The initial inquiry in a Florida libel case has always been to determine whether the statements at issue are substantially false. *See* discussion *infra* at section I.B.2.b. Until recently, there has been considerable doubt regarding whether any similar requirement is imposed by the first amendment. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986), the Supreme Court eliminated that doubt, holding that "a public-figure plaintiff must show the falsity of the statements at issue in order to prevail on a suit for def-

(Continued on following page)

For example, the Fourth District expressly relied on its prior decision in *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593 (Fla. 4th DCA 1983), *pet. for rev. denied*, 443 So.2d 979 (Fla. 1984), wherein the court had determined that, as a matter of Florida common law, "[a] false statement of fact is the *sine qua non* for recovery in a defamation action." *Id.* at 595 (emphasis in original). Indeed, in drawing that conclusion, the court in *Byrd* relied exclusively on Florida common law, citing no federal constitutional case law for support. In addition to *Byrd*, the Fourth District in the instant case cited its decision in *Wolfson v. Kirk*, 273 So.2d 774 (Fla. 4th DCA), *pet. for rev. denied*, 279 So.2d 32 (Fla. 1973), a decision that, like *Byrd*, relied solely on Florida common law. Finally, the Fourth District relied on *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962), a case decided before the United States Supreme Court had held that constitutional considerations apply in libel cases.[8]

That substantial truth is an independent state ground for the Fourth District's decision is clear because the court, after finishing its analysis of the substantial truth doctrine, went on to hold separately that "[i]*n any case*,

---

Footnote continued—

amation." 106 S.Ct. at 1563. The Fourth District did not, however, cite or rely on the *Hepps* decision. Thus, the recent, additional "constitutionalization" of libel law by *Hepps*, long after the Florida "substantial truth" doctrine was well-established as a matter of state common law, does not provide a jurisdictional basis for this Court to review the state court decision. This is not a decision such as *Michigan v. Long*, 463 U.S. 1032, where the state court decision merely cited to a state constitutional provision and then "relied *exclusively* on its understanding of . . . federal cases" to interpret that state law. *Id.* at 1043 (emphasis in original).

8. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding, for the first time, that constitutional considerations apply in libel actions).

the . . . evidence of actual malice fall[s] well short of the clear and convincing standard mandated by the U.S. Supreme Court." *Friedgood,* 521 So.2d at 242 (emphasis added). Thus, the federal ground appears as an independent ground for affirmance of the summary judgment.

### b. Substantial Truth Is an Adequate State Ground for the State Court's Decision

The state law ground articulated by the Fourth District is adequate to support the judgment without consideration of any federal question. *See generally Fox Film Corp. v. Muller,* 296 U.S. 207, 210-11 (1935); *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164-65 (1917). A state law ground is not regarded as inadequate unless it "is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrigation,* 243 U.S. at 164. Where the state ground has any "fair support," this Court is "not at liberty to inquire whether it is right or wrong, but must accept it." *Id.*

The state ground upon which the decision below rests has far more than "fair support." The substantial truth doctrine is firmly rooted in the Florida common law. *See, e.g., Byrd,* 433 So.2d at 595; *Delacruz v. Peninsula State Bank,* 221 So.2d 772, 775 (Fla. 2d DCA 1969) (plaintiff required to prove falsity); *Hawke v. Broward National Bank,* 220 So.2d 678, 679-80 (Fla. 4th DCA 1969) (plaintiff required to plead falsity). Florida's Second District Court of Appeal observed in *McCormick v. Miami Herald Publishing Co.*:

> "It has been held that newspapers are not to be held to the exact facts or to the most minute details of

> the transactions they publish, that what the law requires is that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial."

139 So.2d at 200 (citation omitted).

The contemporary, common law framework for determining whether an allegedly defamatory statement would be treated as "substantially true" under Florida law was established by the facts of *McCormick*. The plaintiff in that case sued a newspaper because it had published an article about his evasion of taxes. The article gave factual descriptions of tax liens on the plaintiff's property and said that federal agents had collected his salary. The plaintiff claimed that some of the facts were in error and that the article accused him of committing a crime. The court rejected the contention that a few factual errors tainted the entire article so as to make it actionable, finding that: "A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted).

Since the decision in *McCormick*, many Florida courts have accepted and applied the rationale from that case. *E.g., Byrd,* 433 So.2d at 595; *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254, 256 (Fla. 2d DCA 1970); *Bair v. Palm Beach Newspapers, Inc.*, 2 Fla. Supp.2d 137, 138-39 (15th Cir. 1982), *aff'd*, 444 So.2d 1131 (Fla. 4th DCA 1984); *see also Hallmark Builders, Inc. v. Gaylord Broadcasting Co.*, 733 F.2d 1461, 1463-64 (11th Cir. 1984) (applying Florida law); *Valentine v. CBS Inc.*, 698 F.2d 430, 432 (11th Cir. 1983) (applying Florida law).

In the instant case, the Fourth District's decision faithfully adhered to the substantial truth doctrine, comparing the gist or sting of the statements published to the truth admitted by the plaintiff. *Friedgood*, 521 So.2d at 242. However the words of the book review are construed, the gist of the meaning conveyed is that the plaintiff concealed evidence of her mother's murder at her father's direction. This is in fact admitted by the plaintiff. *Id.* at 242-43. Therefore, the same judgment would be rendered by the state court even after a correction by this Court of any error in the Fourth District's statement or application of the federal law. Thus, a decision by this Court "could amount to nothing more than an advisory opinion." *Pitcairn*, 324 U.S. at 126.

Because it is "clear from the opinion itself that the state court relied upon an adequate and independent state ground," *see Long*, 463 U.S. at 1042, this Court must decline to exercise its jurisdiction over this case.

## II.

### No Reasons Exist for Granting the Writ

Even if this Court has jurisdiction to review the Fourth District's decision, a writ of certiorari should not be granted in this case. Nowhere in the petition for writ of certiorari does the plaintiff make a serious attempt to show that the reasons justifying review by this Court, as set forth in Rule 17.1 of this Court, exist in this case.

Rather, the plaintiff argues principally that this Court should review the decision below because the Florida court afforded the publisher of a book review the same constitutional protection from a libel suit as that which traditionally has been afforded to other journalists and

historians. This simply is not a reason for granting review, nor is it even a basis to question the decision below.

### A. The State Court Did Not Decide a Federal Question in a Way in Conflict With Another State Court of Last Resort or a Federal Court of Appeals

The plaintiff fails to cite a single decision of a federal court of appeals or of another state court of last resort which conflicts with the decision below. In fact, the plaintiff emphasizes that such federal courts of appeals decisions as *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612 (2d Cir.), *cert. denied*, 109 S.Ct. 145 (1988); *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); and *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), were factually dissimilar from the instant case. (Petitioner's Brief at 17).

### B. The State Court Did Not Decide an Important Federal Question Which Has Not Been, But Should Be, Settled by This Court

The plaintiff observes that this Court expressly reserved for another day in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), this question: "[W]hether or when an individual who was once a public figure may lose that status by the passage of time." *Id.* at 165 n.7 (quoted in Petitioner's Brief at 16). But that question also was left unresolved by the Florida court below. The Fourth District found no need to address the issue be-

cause the public controversy which initially gave rise to the plaintiff's public figure status in 1976 still existed at the time the book review at issue was published. The court noted: "Esther's father remains incarcerated and, the record reflects, still professes his innocence. It would seem reasonable under these circumstances to conclude that public discussion about the case may continue." *Friedgood,* 521 So.2d at 242.

Furthermore, close comparison of the facts of *Wolston* and other cases which have raised the "passage of time" issue such as *Street,* 645 F.2d 1227, confirm that the "passage of time" issue is not properly raised in the instant case.

In *Wolston,* the defense argued that the plaintiff became a public figure by choosing not to appear before a controversial grand jury investigating Soviet espionage during 1957 and 1958. The plaintiff insisted initially that, even if this were true, he had not remained a public figure for purposes of a libel action based on a book published 16 years later in 1974, long after the controversy regarding the grand jury investigation had been extinguished and long after the plaintiff had been the subject of any public discussion. *See* 443 U.S. at 165 n.7.

In *Street,* the plaintiff became a public figure by virtue of her involvement in a widely reported rape trial in 1933. Immediately after the trial, the plaintiff disappeared from public view. *See* 645 F.2d at 1230. More than 40 years later, NBC broadcast a historical drama regarding the rape trial and the plaintiff sued for libel, claiming that even if she had obtained public figure status during the 1933 trial, the elapse of 40 years during which she was not in the public view required that her status be changed to that of a private figure. *Id.* at 1235.

In the instant case, by contrast, the time that elapsed between the plaintiff's initial involvement in the controversy at issue and the time of publication was minimal[9] and, perhaps more importantly, the plaintiff never truly left the public eye. The plaintiff first injected herself into the controversy surrounding her father's murder prosecution in 1976. It is not disputed in this record that the prosecution was the subject of detailed and widespread press coverage from 1976 through 1979.[10] In late 1980, Leonard Levitt published a book concerning the Friedgood family and the murder, while the appeal of the murder conviction itself and related litigation continued to spawn controversy and public debate.[11]

Just several months after publication of Levitt's book, the respondent published the book review at issue. There is no evidence—upon which the Court might construct a "passage of time" rule—that this plaintiff ever withdrew into a private existence. The issue cannot be meaning-

---

9. The Fourth District found this point of distinction critical, observing: "Unlike *Street*, we do not have a 40-year interval but rather one of a few years." *Friedgood*, 521 So.2d at 242.

10. The plaintiff moved to Florida during this time, but remained in public view, working first as a judicial clerk for the District Court of Appeal of Florida, Fourth District, running for the post of city commissioner of West Palm Beach in 1978, becoming editor of the *Palm Beach County Bar Bulletin*, giving radio interviews on various legal issues, and lobbying the Florida legislature for a planned parenthood organization.

11. *See Midland Ins. Co. v. Friedgood*, 577 F. Supp. 1407, 1409 & n.2 (S.D.N.Y. 1984) (reporting on the activities of the "Committee to Free Dr. Charles Friedgood" which purportedly raised as much as $145,000 "from assorted acquaintances, patients and others believing in Dr. Friedgood's innocence"); *People v. Friedgood*, 58 N.Y.2d 467, 462 N.Y.S.2d 406 (1983) (describing the 11-week jury trial and the claims of prosecutorial misconduct, juror misconduct and perjury in Dr. Friedgood's collateral attack on the verdict).

fully addressed in this case and accordingly, must be left for still another day.

Of course, the plaintiff has not plainly stated that she even contests the essential holding of such cases as *Street* that the passage of time does not erode an individual's public figure status. Rather, plaintiff apparently has accepted that the passage of time will not destroy such status for purposes of journalistic and historical writings and appears to assert only that public figure status should not continue to be ascribed to the plaintiff when the defendant is a book reviewer. This argument is not rooted in any analysis of this Court's decisions[12] or the decisions of any other court. In fact, the argument invites the Court to distinguish between different types of media and different forms of expression in a fashion which is impermissible under the first amendment itself. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (holding discrimination between types of media violates the first admendment in the absence of compelling, narrowly tailored reasons); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same).

### C. The State Court Did Not Decide a Federal Question in a Way in Conflict With Applicable Decisions of This Court

In an apparent attempt to make some showing that there is a basis for seeking review, plaintiff argues near the conclusion of her brief that if this Court is to be true

---

12. This Court at least implicitly has rejected such an argument in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that constitutional protections against libel actions apply to all speech about matters of public concern).

to *New York Times*, 376 U.S. 254, and to *Wolston*, 443 U.S. 157, this Court should exercise its jurisdiction because "there is not the slightest suggestion that history was being chronicled, reported, or digested." (Petitioner's Brief at 21). The argument is a *non sequitur*. Neither *New York Times* nor *Wolston* confines the constitutional protections of the press to chronicles, reports or digests of history. Moreover, even if such a restriction could be gleaned from those cases, the article at issue would qualify for the available protection. The book review appeared in a national magazine of general circulation. It chronicles not only the history of Dr. Friedgood, the Friedgood family, the Friedgood murder trial, and the changes in New York law which were prompted by the *Friedgood* case, but it also reports on the significant literary fact that a book regarding this subject has been published. Such a publication is both a journalistic and historical writing entitled to the full protection of the first amendment.

## CONCLUSION

The petition for writ of certiorari to the District Court of Appeal of Florida, Fourth District, should be denied.

Respectfully submitted,

STEEL HECTOR & DAVIS
By THOMAS R. JULIN
(Counsel of Record)
ALICIA R. ZALESIN
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810
*Attorneys for Peters Publishing Co.*

Dated: December 23, 1988